EQUALITY IN EMPLOYMENT AND OCCUPATION

INTERNATIONAL LABOUR CONFERENCE 83rd SESSION 1996

INTERNATIONAL LABOUR OFFICE GENEVA

EQUALITY IN EMPLOYMENT
AND OCCUPATION

International Labour Conference
83rd Session 1996

Report III (Part 4B)

Third item on the agenda:
Information and reports on the application
of Conventions and Recommendations

Special Survey on Equality in Employment and Occupation in respect of Convention No. 111

Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution)

Cover photographs: J. Maillard/ILO

EQUALITY IN EMPLOYMENT AND OCCUPATION

INTERNATIONAL LABOUR OFFICE GENEVA

ISBN 92-2-109866-4
ISSN 0074-6681

First published 1996

The publication of information concerning action taken in respect of international labour Conventions and Recommendations does not imply any expression of view by the International Labour Office on the legal status of the State having communicated such information (including the communication of a ratification or declaration), or on its authority over the areas or territories in respect of which such information is communicated; in certain cases this may present problems on which the ILO is not competent to express an opinion.

ILO publications can be obtained through major booksellers or ILO local offices in many countries, or direct from ILO Publications, International Labour Office, CH-1211 Geneva 22, Switzerland. A catalogue or list of new publications will be sent free of charge from the above address.

Printed in Switzerland ATA

Summary

Paragraphs

Introduction 1-17

Title I — Content of Convention No. 111 18-141

Title II — Examination of special reports 142-160

Title III — Analysis of developments in the application of the principles of the Convention 161-289

Conclusions 290-308

Appendices

Table of contents

Paragraphs

Introduction 1-17
  Background 6-7
  ILO activities 8-12
  Promotion of Convention and Recommendation No. 111 13-17

Title I — Content of Convention No. 111 18-141

Chapter 1: Scope of the instruments as regards individuals, definition and grounds of discrimination 18-64
  A. Scope of the instruments as regards individuals 19-22
  B. Definition of discrimination 23-26
  C. Grounds of discrimination 27-64
    1. Grounds of discrimination referred to in Article 1, paragraph 1(a), of the Convention 28-47
      (a) Race and colour 30-32
      (b) National extraction 33-34
      (c) Sex 35-40
      (d) Religion 41-42
      (e) Social origin 43-44
      (f) Political opinion 45-47
    2. Other grounds of discrimination 48-64
      (a) Workers with family responsibilities 53-54
      (b) Disabled persons 55-56
      (c) State of health 57-60
      (d) Age 61-62
      (e) Trade union membership 63-64

Chapter 2: Fields covered by the Convention: Access to training, occupation and employment, terms and conditions of employment 65-116
  A. Access to training and vocational guidance 69-77
    1. Training 70-73
    2. Vocational guidance 74-77
  B. Access to employment and to particular occupations 78-101
    1. Access to wage employment 82-88
    2. Access to non-wage work 89-91
    3. Placement 92-94

Paragraphs

4. Access to the public service 95-99
5. Access to employers' and workers' organizations 100-101

C. Terms and conditions of employment 102-116
   1. Advancement 103-105
   2. Security of tenure 106-109
   3. Equal remuneration 110-112
   4. Social security 113
   5. Other conditions of employment 114-116

Chapter 3: Measures not deemed to be discrimination 117-141

A. Inherent requirements of a particular job 118-122
B. Measures affecting an individual suspected of activities prejudicial to the security of the State 123-129
C. Special measures of protection or assistance 130-141
   1. Measures provided for in international labour standards 131-133
   2. Measures designed to meet the particular requirements of certain persons 134-141
      (a) Measures adopted on the basis of sex 138
      (b) Measures adopted for older persons 139
      (c) Measures adopted for disabled persons 140
      (d) Measures adopted for ethnic minorities and other social groups 141

Title II — Examination of special reports 142-160

1. State of reporting 142-145
2. Ratifications under way or envisaged 146-149
3. Difficulties delaying or impeding ratification 150-152
4. Other situations 153-154
5. The Committee's comments 155-160

Title III — Analysis of developments in the application of the principles of the Convention 161-289

Chapter 1: The most common grounds of discrimination 161-202

A. Race, colour, national extraction 161-168
B. Sex 169-185
C. Religion 186-191
D. Political opinion 192-202

Chapter 2: Practical difficulties and principal obstacles to the application of the Convention 203-238

A. Elimination of discrimination: Legislation and practical application 206-222
   1. Legislation 206-212
   2. Practical difficulties 213-222

Paragraphs

B. Promoting equality: National policy, practical activities, institutional framework . . . 223-234
C. Assistance by the International Labour Office to implement the Convention . . . 235-238

Chapter 3: The emergence of other grounds . . . 239-277
A. Grounds referred to in Article 5 of the Convention . . . 240-242
B. Grounds referred to in other ILO instruments . . . 243
(a) Age . . . 243
(b) Nationality . . . 243
(c) Trade union membership . . . 243
(d) Disability . . . 243
(e) Family responsibilities . . . 243
C. Grounds contained in other international instruments . . . 244-245
D. Grounds of discrimination that are emerging . . . 246-277
(1) Age . . . 247-254
(2) State of health . . . 255-272
(3) Sexual orientation . . . 273-277

Chapter 4: Policies and action programmes affording effective remedies for discriminatory practices . . . 278-289

Conclusions . . . 290-308
Fundamental importance of the Convention . . . 290-293
Suggestions for broadening the protection provided by the Convention . . . 294-302
The need for continuous action . . . 303-304
The need for a general context of equality . . . 305
Promotional activities . . . 306-308

Appendices

I. List of the 52 ILO member States which have been asked to submit reports on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
II. Ratifications of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
III. Text of the substantive provisions of the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958

INTRODUCTION

1. To strengthen the procedures for supervising the constitutional obligation of non-discrimination, the ILO Governing Body decided at its 208th (November 1978) and 209th (February-March 1979) Sessions that governments of countries which had not ratified the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), should be asked to submit reports under article 19 of the ILO Constitution every four years. At the time of its decision, the Governing Body specified that these reports should be submitted in addition to those normally required under article 19 on other instruments and that governments should only be asked to reply to a limited number of questions, essentially concerning the difficulties of ratification, measures envisaged to overcome them and the prospects of ratification in the near future.[1]

2. To date, such reports on Convention No. 111 have been requested in 1979, 1983 and 1991. In 1980, 1984 and 1992, the Committee included a section in its General Report, summarizing and commenting on the information received and evaluating ratification prospects. In 1962, 1970 and 1987, detailed reports were requested under article 19 on the Convention and its accompanying Recommendation, and they were used, along with the reports submitted under articles 22 and 35 of the Constitution by States that have ratified Convention No. 111, as a basis for the Committee's General Surveys of 1963, 1971 and 1988 concerning equality in employment and occupation.

3. In 1994, 52 member States which had not yet ratified the Convention were again asked to supply special reports under article 19 (see list in Appendix I), and 25 have done so. Four other States have supplied information on the ILO's fundamental Conventions on human rights, which include Convention No. 111. Since the requests were sent out, two States have joined the Organization: the Gambia and Saint Vincent and the Grenadines. They have not been asked to submit special reports under article 19.

4. As at 1 November 1995, Convention No. 111 had been ratified by 120 member States; since the 1992 study of special reports two ratifications have been registered by States which were asked to supply special reports in 1991 (Burundi, El Salvador). (See table below.)

---

[1] Following the decision by the Governing Body at its 264th Session (November 1995), this procedure has been replaced by one which involves the examination, on a cyclical basis, of the situation concerning a certain number of human rights Conventions.

5. The Committee on Legal Issues and International Labour Standards decided at the 261st Session (November 1994) of the Governing Body that given the short interval separating the two 1995 meetings of the Committee of Experts, scheduled for February and November, the General Survey under article 19 to be considered by the Committee of Experts at its November meeting would be limited to the four-yearly special reports on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), scheduled for that session.[2] This is therefore the fourth time that the Committee has been called on to examine reports under the special procedure instituted by the Governing Body. In the absence of an article 19 general survey it has been decided to extend this special survey, in particular in order to promote the ratification of Convention No. 111 and analyse developments as regards its application. The Committee has also decided that in order to provide the ILO with an educational tool for promotional activities in relation to the Convention, it would present in this survey an in-depth review of the provisions of Convention and Recommendation No. 111 along the lines of past general surveys.

Background

6. Equality of opportunity and treatment occupies an important position in the ILO's policy and activities. As early as 1919 the Constitution of the ILO upheld the principle of ensuring opportunities for development and equitable economic treatment for all. The Declaration of Philadelphia concerning the aims and purposes of the International Labour Organization, adopted in 1944 and annexed to the Constitution, states that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity". The Committee has always emphasized that equality of opportunity and treatment in employment and occupation can be realized fully only in a general context of equality in which the rule of law is respected and where a climate of tolerance is developed.

7. When they join the ILO, member States subscribe unreservedly to this basic principle and undertake to share the common task of eliminating discrimination and promoting equality. The adoption of Convention No. 111, and Recommendation No. 111 which supplements it, gave concrete expression to the ILO's commitment to eliminating discrimination in employment, regardless of the grounds on which it is based or the form it takes. Considerable support for the implementation of these standards has been provided by the usual supervisory procedures for the application of Conventions and Recommendations by the Committee of Experts (article 22 of the Constitution), and by procedures for complaints (article 26) and representations (under article 24) which have been used on a number of occasions in this area (see box below). Furthermore, shortly after the adoption of the 1958 instruments, the Organization decided to supplement the usual methods with a special programme of practical activities.

---

[2] GB.261/LILS/4/4.

The ILO's supervisory system is composed of *regular reporting* on the basis of ratified Conventions, and of *complaints procedures*. When States ratify Conventions, they are bound by article 22 of the ILO Constitution to submit regular reports on their law and practice, which are examined by the Committee of Experts on the Application of Conventions and Recommendations, made up of independent experts in law and social policy. Governments are also obliged to send copies of their reports to employers' and workers' organizations, who have the right to comment on them. The Committee of Experts' annual report is reviewed by the International Labour Conference, whose Committee on the Application of Conventions and Recommendations is composed of representatives of governments and of employers' and workers' organizations. As for complaints, the ILO Constitution provides in article 24 that *representations* may be filed by employers' or workers' organizations alleging that a country that has ratified a Convention is not "securing its effective observance". A *complaint* may be filed under article 26 of the Constitution by another country that has ratified the same Convention, or by a delegate to the International Labour Conference; it may also be instituted by the Governing Body of the ILO. A special complaint procedure exists by which organizations of employers and workers may file complaints of violations of freedom of association, regardless of whether the relevant ILO Conventions have been ratified by the State concerned. For a complete description of these procedures, see the *Handbook of Procedures relating to International Labour Conventions and Recommendations* (ILO, 1995).

ILO activities

8. Since the 1988 General Survey, which described ILO action regarding equality and activities undertaken by the United Nations and other organizations,[3] the ILO's programme in this area has continued to expand.

9. An example in the field of racial discrimination is the ILO's activities in relation to South Africa. For nearly 30 years these activities were focused on the struggle against the racist system of apartheid. In 1964 the Conference adopted a Declaration concerning Action against Apartheid in South Africa, and a Programme of Action, which it amended on several occasions. The Declaration was suspended in 1993 by the Governing Body, and the Programme of Action was modified after the positive changes that took place in South Africa. The Governing Body also approved in 1993 a plan of action for ILO assistance to help South Africa in the transition to a full democracy and in overcoming the effects of apartheid.[4] During the final session of the Conference Committee on Action against Apartheid, held in 1994, a resolution concerning post-apartheid South Africa was adopted in response to the installation of a transitional Government in 1993 and the holding of elections in April 1994, which marked the dawn of a new era in the history of that country.[5] The Declaration was rescinded.

---

[3] See General Survey by the Committee of Experts on the Application of Conventions and Recommendations on equality in employment and occupation (referred to in the present study as the General Survey of 1988), ILC, 75th Session, 1988, paras. 3-8 and 9-10.

10. In addition, a Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment was held in October 1989. The meeting emphasized, in particular, that reviewing the protective measures that apply to women is one way of ensuring equality between men and women and that this aim can be achieved only if there is a fundamental change in society's attitudes and practices. This trend is reflected in the review of the standards on night work for women, considered to be overly protective and to restrict unnecessarily the employment opportunities available to women.

11. Whilst in the early days of the Organization emphasis was placed primarily on protecting women from working conditions that were excessively arduous and hazardous to their health, the current trend is to give greater importance to promoting equality between men and women. A telling example of this tendency in the area of equality in employment between men and women is the action undertaken to review the standards on night work for women. In 1990 the International Labour Conference adopted a Protocol revising the Night Work (Women) Convention (Revised), 1948 (No. 89), to make it more flexible, and the Night Work Convention (No. 171) and Recommendation (No. 178), which afford protection for both men and women involved in night work, and set forth special provisions for women during pregnancy and immediately after childbirth or confinement.

12. Following the adoption by the Conference of a resolution concerning ILO action for women workers in June 1991, activities specifically aimed at improving the situation of women workers were incorporated in most ILO programmes and greater emphasis was placed on equality between the sexes in general activities.

Promotion of Convention and Recommendation No. 111

13. By adopting the procedure of four-yearly special reports, the Governing Body wished to allow a regular examination of the situation in countries which have not ratified the Convention and to encourage them to do so. This decision was taken after a resolution concerning human rights was adopted by the Conference in 1977, in which the Conference recalled that non-discrimination is a basic principle of the ILO's Constitution and its furtherance constitutes a constitutional obligation for all member States. In accordance with this decision, ratification should be a way to confirm and highlight the general obligation arising out of the Constitution.

---

[4] GB.258/LILS/9/5.

[5] *Provisional Record* No. 17, ILC, 81st Session, 1994.

14. The tables on the following pages show the ratification record of the Convention, which came into force on 15 June 1960, since its adoption on 25 June 1958; 120 member States have ratified the Convention and 53 have not yet done so.

15. It appears from the information provided by governments, either in the special reports or in their reports submitted on the fundamental ILO Conventions (see next paragraph), that nine countries envisage ratification of the Convention in the near future; one country is studying the prospects of ratification; and two countries consider that there are no major difficulties preventing ratification. Other countries, however, stated that they were unable to proceed with ratification: difficulties delaying ratification were mentioned by six countries and obstacles preventing ratification were referred to by three countries. Six other countries do not envisage ratification for other reasons. Government reports are examined in Title II of this survey.

16. It should be mentioned here that in accordance with the Programme of Action to preserve and promote the basic rights of workers which was included in the Declaration adopted at the World Summit for Social Development (Copenhagen, March 1995), the Governing Body decided at its 262nd Session (March-April 1995) to ask the Director-General to present to it a report on the basis of information to be requested from member States on those ILO Conventions concerning basic human rights[6] that they have not yet ratified. This will be followed up in order to promote the universal ratification of all these Conventions.

17. A description of the contents of Convention No. 111 constitutes Title I. An examination of the special reports sent by governments on the basis of the ILO questionnaire is contained in Title II. Title III analyses developments in the application of the principles of the Convention by those member States which have ratified it, and describes the positive measures to be adopted to implement the principles of the Convention.

---

[6] The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105); the Equal Remuneration Convention, 1951 (No. 100); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138).

Table 1. Cumulative total of member States having ratified the Convention

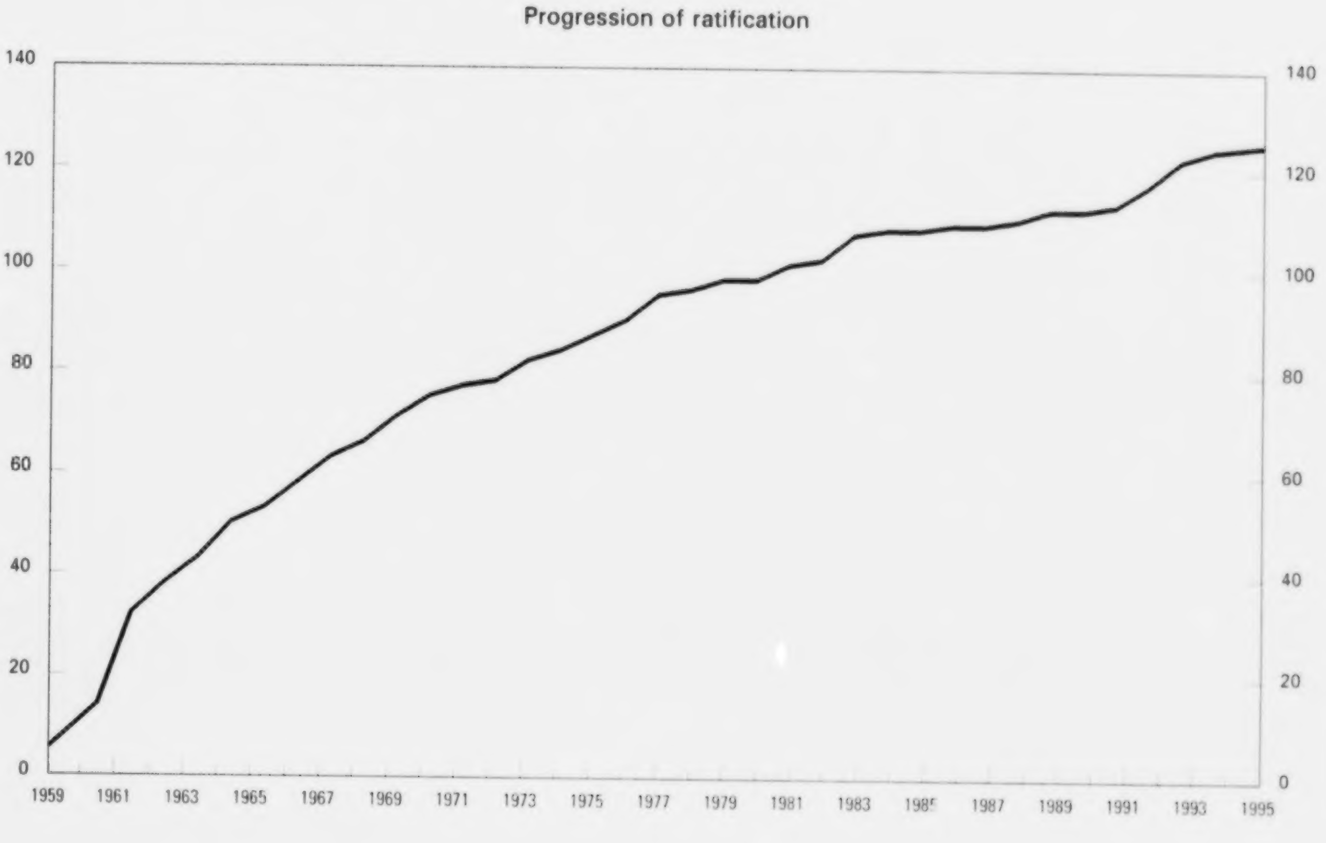
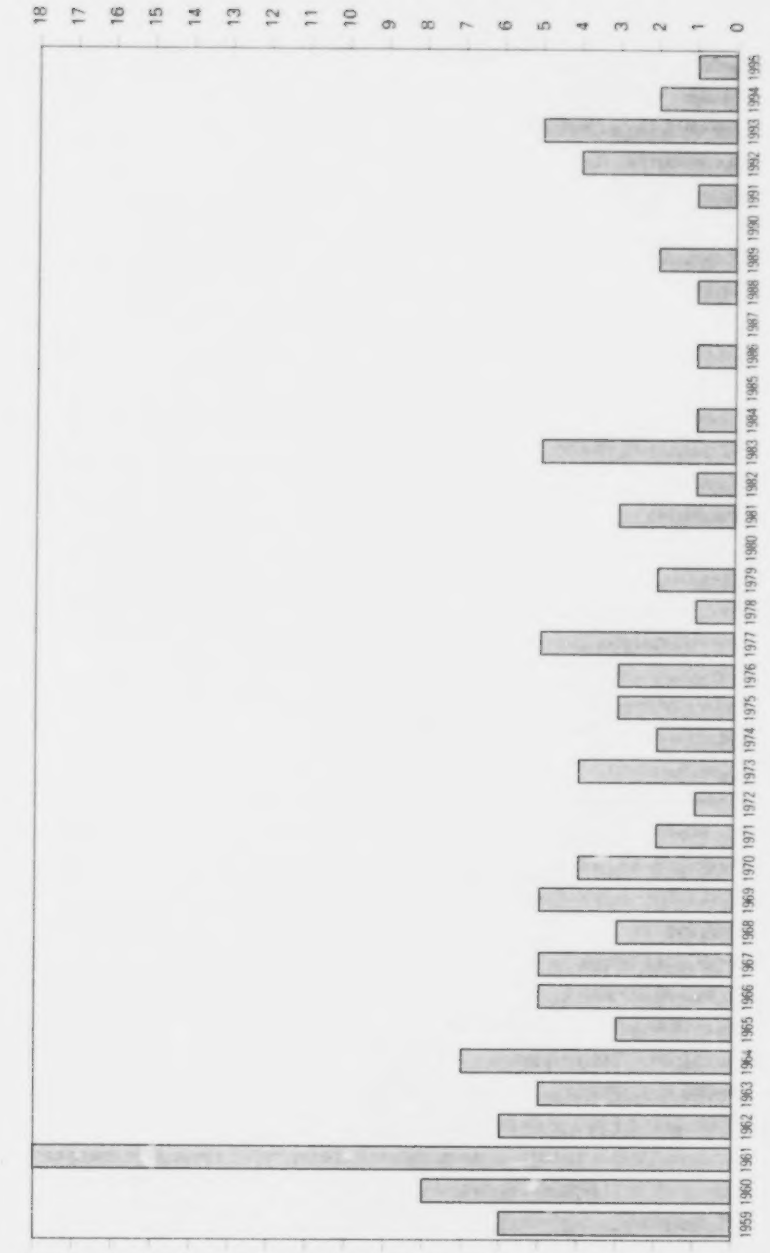


Table 2. Annual number of member States having ratified the Convention

Progression of ratification



TITLE I

Content of Convention No. 111

CHAPTER 1

Scope of the instruments as regards individuals, definition and grounds of discrimination

18. The Convention begins by defining its scope as regards individuals (section A). The definition of the term "discrimination" is a broad one (section B). However, not all distinctions, exclusions or preferences in employment and occupation are contrary to the Convention, which specifies certain grounds on which it applies (section C).

A. Scope of the instruments as regards individuals

Application of the Convention to all persons

19. No provision of Convention No. 111 limits its scope as regards individuals and occupations. The purpose of the instrument is to protect all persons against discrimination in employment or occupation on the basis of race, colour, sex, religion, political opinion, national extraction and social origin, with the possibility of extending its protection to discrimination on the basis of other criteria.

20. At the same time the Conference adopted Convention No. 111, it also adopted Recommendation No. 111 which supplements the Convention. In addition to the protection provided by the Convention, Recommendation No. 111 contains provisions that also refer to the particular situation of migrant workers. ILO instruments define a "migrant for employment" as "a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment" (Article 11, paragraph 1, of the Migration for Employment Convention (Revised), 1949 (No. 97)). Paragraph 8 of Recommendation No. 111 provides that with respect to immigrant workers of foreign nationality and the members of their families, regard should be had to the provisions of Convention No. 97 relating to equality of treatment and to those of its accompanying Recommendation relating to the lifting of restrictions on access to employment. This instrument was later supplemented by the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151), which contain the same definitions and terms as those given in Convention No. 111.

21. In accordance with these instruments, not only should migrant workers lawfully within the territory of a signatory State enjoy equal treatment (Article 6 of Convention No. 97), they should also benefit from a national policy designed to promote equality of opportunity (Part II of Convention No. 143), which implies the adoption of positive measures.[1]

22. There are also other ILO instruments relating to non-discrimination, which provide more specific protection than that under Convention and Recommendation No. 111; these concern workers with family responsibilities, part-time work, indigenous and tribal peoples, women and disabled persons.

B. Definition of discrimination

23. Article 1, paragraph 1(a), of Convention No. 111 defines discrimination as "any distinction, exclusion or preference [based on certain grounds] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". This purely descriptive definition contains three elements:

- *a factual element* (the existence of a distinction, exclusion or preference originating in an act or omission) *which constitutes a difference in treatment*;
- *a ground on which the difference in treatment is based*; and
- *the objective result of this difference in treatment* (the nullification or impairment of equality of opportunity or treatment).

Through this broad definition, the 1958 instruments cover all the situations which may affect the equality of opportunity and treatment that they are to promote.

24. Most national legislation contains essentially these same elements, using the same terms as the Convention. Prohibited distinctions are enumerated, along with the fields in which the prohibition applies. The legislation specifies that any difference in treatment based on a prohibited ground and applying to one of the fields enumerated, *a priori* constitutes discrimination.

25. Any discrimination — in law or in practice, direct or indirect — falls within the scope of the 1958 instruments. General standards that establish distinctions based on prohibited grounds constitute discrimination in law. The specific attitude of a public authority or a private individual that treats unequally persons or members of a group on a prohibited ground constitutes discrimination in practice.

---

[1] In its General Survey of 1980 on migrant workers, the Committee stressed in paragraph 29 that: "Paragraph 1 of Article 11 of Convention No. 97 and Paragraph 1(a) of Recommendation No. 86 define a 'migrant for employment' as 'a person who migrates from one country to another *with a view to being employed* otherwise than on his own account and includes any person regularly admitted as a migrant for employment'. Paragraph 1 of Article 11 of Convention No. 143 contains a very similar definition. However, it is specified that the definition applies only for the purpose of Part II of the Convention, which concerns equality of opportunity and treatment."

26. Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job.

C. Grounds of discrimination

27. Not all distinctions, exclusions or preferences in employment and occupation are contrary to the Convention. Those which are considered to be unlawful, and therefore should be covered by the national policy to promote equality of opportunity and treatment, are those based on:

- one of the grounds expressly referred to in Article 1, paragraph 1(a), of the Convention (discussed in subsection 1 below); or
- a ground determined after consultation with representative employers' and workers' organizations in accordance with Article 1, paragraph 1(b), of the Convention (discussed in subsection 2 below).

1. Grounds of discrimination referred to in Article 1, paragraph 1(a), of the Convention

28. Article 1, paragraph 1(a), of the Convention and the corresponding provisions of the Recommendation refer to seven grounds of discrimination. It is now universally recognized that discrimination based on such grounds is contrary to the concept of fairness and human dignity.

29. In practice, there appears to be a fine line between these various grounds of discrimination. First of all, an individual may be subject to discrimination based on more than one ground. For example, social origin may be considered as presumptive evidence of certain political opinions. This can also be seen to be true in the case of religion, race or colour. Secondly, in the context of employment and occupation these grounds are not necessarily revealed by distinctive external features. Difficulties may therefore arise in providing proof of discrimination, particularly if the burden of proof lies with the victim. The Committee has always welcomed cases in which governments have imposed the burden of proof on the alleged author of the discrimination.

(a) Race and colour

30. Discrimination on the basis of race and colour will be examined together. What is usually called "race" is the ethnic group to which an individual belongs by reason of heredity. Difference of colour is only one of the ethnic characteristics, but it is the most apparent, and is therefore often linked to the ground of race in constitutional or legislative provisions adopted by certain countries to prohibit discrimination.

31. The term "race" or "racism" is often used loosely to refer to linguistic communities or minorities whose identity is based on religious or cultural characteristics, or even on national extraction though more precise definitions can be found in international legal texts (for example, the International Convention on the Elimination of All Forms of Racial Discrimination). Generally speaking, any discrimination against an ethnic group is considered to be racial discrimination. However, distinctions can be drawn between the situation of ethnic minorities, of that of indigenous and tribal peoples, and the situation of any other group disadvantaged on racial grounds. Racial prejudice is largely rooted in social and economic factors, a value judgement without any objective basis and cultural in origin.

32. In any case, when faced with the need for effective protection against discrimination on the grounds of race and colour, the main problem is not so much to define the terms employed as to eradicate the negative values that the perpetrators of discrimination attribute to the person discriminated against. In such cases, and especially through the use of positive measures, state policies should be aimed at making equality of opportunity a reality for every population group.[2]

(b) National extraction

33. The concept of national extraction in the 1958 instruments does not refer to the distinctions that may be made between the citizens of one country and those of another, but to distinctions between the citizens of the same country on the basis of a person's place of birth, ancestry or foreign origin. It should, however, be borne in mind that in some countries, a distinction is made between the concept of citizenship and that of nationality in the meaning that the term can take to designate membership in one of several ethnic or other communities comprising the citizens of the country, and these countries, thus have citizens of different "nationalities". In some countries, this ground has been defined so as to include related grounds of discrimination, such as language, which sometimes carries implications as to race, birthplace, region of origin or ethnic origin.

34. With due consideration for the special problems facing foreigners as regards employment and occupation, national extraction, as was made clear in the preparatory work for the Convention, refers to distinctions made within a country between its own nationals on the basis of their foreign extraction or birth. Thus discrimination based on national extraction means that which may be directed against persons who are nationals of the country in question, but who have acquired their citizenship by naturalization or who are descendants of foreign immigrants, or persons belonging to groups of different national extraction living in the same State.

---

[2] See para. 33 of the 1988 General Survey.

(c) Sex

35. Distinctions based on sex are those which use the biological characteristics and functions that differentiate men from women. Such distinctions include those established explicitly or implicitly, to the disadvantage of one sex or the other. Women are most commonly affected, especially in the case of indirect discrimination, by these distinctions, which stem from traditional attitudes that still persist strongly in certain societies, while in others they have lost considerable ground, mainly as a result of greater participation by women in every sphere of activity. Legislation concerning non-discrimination between the sexes is an important step in a policy of equality of opportunity and treatment in employment and occupation.

36. Even when it no longer stems from a presumption of inferiority, discrimination against women in employment is still often fuelled by other considerations that limit their opportunities of obtaining or remaining in employment.

(i) Civil and marital status, family situation, pregnancy and confinement

37. Sex-based discrimination also includes that based on marital status or, more specifically, family situation (especially in relation to responsibility for dependent persons), as well as pregnancy and confinement.

38. Distinctions linked to civil status can affect both men and women and are not *in themselves* discriminatory. They are only discriminatory within the meaning of the Convention if they result in a requirement or condition being imposed on an individual of one sex that would not be imposed on someone of the other sex. The discriminatory nature of distinctions based on pregnancy, confinement and related medical conditions is demonstrated by the fact that, by definition, they can only affect women. The same applies to physical requirements or conditions that are apparently applied equally but result in de facto discrimination. This often appears to be the case, for example, of requirements concerning height or weight which are the same for both men and women. All of these distinctions are often considered to be indirect discrimination (see paragraph 26 above).

(ii) Sexual harassment

39. The terms "sexual harassment" or "unsolicited sexual attention" include any insult or inappropriate remark, joke, insinuation and comment on a person's dress, physique, age, family situation, etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality; and any unnecessary physical contact such as touching, caresses, pinching or assault. In order to constitute sexual harassment in employment, an act of this type must, in addition, be justly perceived as a condition of employment or precondition for employment, or influence decisions taken in this field, and/or affect job performance. Sexual harassment may also arise from situations which are generally hostile to one sex or the other.

40. Sexual harassment undermines equality at the workplace by calling into question individual integrity and the well-being of workers; it damages an enterprise by weakening the bases upon which work relationships are built and impairing productivity. In view of the gravity and serious repercussions of this practice, some countries are now adopting legislation prohibiting it and making it subject to civil and/or criminal penalties.

(d) Religion

41. Religious considerations as the basis of distinctions in social life, and in occupational life in particular, may vary in nature. When communities of different religions that have traditionally existed in relative separation coexist in the same country, the problems that result are comparable to those encountered in multiracial or multi-ethnic communities. The risk of discrimination also often arises from the absence of religious belief or from belief in different ethical principles, from a lack of religious freedom or from intolerance, in particular where one religion has been established as the religion of the State, where the State is officially anti-religious, or where the dominant political doctrine is hostile to all religions.

42. The freedom to practise a religion can be hindered by the constraints of a trade or occupation. This may happen when a religion prohibits work on a day different from the day of rest established by law or custom, when the exercise of a religion requires a special type of clothing or work conditions, or when taking up a certain position requires an oath incompatible with a religious belief or practice. In these cases the worker's right to practise his or her faith or belief needs to be weighed against the need to meet the requirements inherent in the job or operational requirements. These rights may, however, be restricted within the limits imposed by the principle of proportionality, taking care to avoid arbitrary repercussions on employment and occupation, particularly in the public sector. Consideration should also be given to appropriate measures to eliminate all forms of intolerance. It should be recognized that in certain cases religion could constitute a qualification that could be required in good faith for a particular job or occupation, as provided in Article 1, paragraph 2, of the Convention.

(e) Social origin

43. The problem of discrimination based on social origin is unquestionably one of the most difficult to define. It arises when an individual's membership in a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied certain jobs or activities, or because he or she is only assigned certain jobs. In most countries today, situations of this type are becoming increasingly rare. Social origin may be viewed mainly in terms of social mobility, defined as the possibility for an individual to move from one class or social category to another.

44. Prejudices and preferences based on social origin may persist when a rigid division of society into classes determines an individual's opportunities in employment and occupation, or when certain "castes" are considered to be inferior and therefore confined to the most menial jobs. Even in societies with considerable social mobility, where rigid stratification has disappeared, and despite measures adopted to increase training opportunities for those groups that are at a disadvantage because of their origin, there are still various obstacles to equality of opportunity. This is probably due to the fact that the measures to be taken cover a whole range of approaches lying within the competence of different sectors of government activity, often making coordination, and hence implementation, a complicated process. In addition, social origin can also give rise to a presumption of certain political opinions which may work either to the advantage or to the disadvantage of the persons concerned; this can also be seen to be true in the case of religion, race and colour.

(f) Political opinion

45. In protecting individuals against discrimination in employment and occupation on the basis of political opinion, the Convention implies that this protection shall be afforded to them in respect of activities expressing or demonstrating opposition to the established political principles, or simply a different opinion. The protection of political opinions only applies to opinions which are either expressed or demonstrated, and does not apply if violent methods are used to express or demonstrate these opinions.

A Commission of Inquiry appointed under article 26 of the Constitution of the ILO[1] made the following comments:

"The protection of freedom of expression is aimed not merely at the individual's intellectual satisfaction at being able to speak his mind, but rather – and especially as regards the expression of political opinions – at giving him an opportunity to seek to influence decisions in the political, economic and social life of his society." A corollary of protection of the freedom to demonstrate one's opinions is protection of the freedom to join with others in order to secure acceptance of one's political convictions. It follows that "measures taken against a person by reference to the aims of an organization or party to which he belongs ... restrict his freedom to manifest his opinions". The problem is even more serious now that access to the media has brought political life closer to increasingly wide sectors of society, even in the least developed countries.

[1] *Official Bulletin*, Vol. LXX, 1987, Series B, Supplement 1, para. 515.

46. Widespread recognition is given in law to the prohibition of all types of discrimination based on political opinion. However, in some countries individuals are denied employment or excluded from the protection afforded by the law on equality, on the grounds of their membership in a political party; in others, account is taken of political or socio-political attitude, civic commitment or moral qualities with regard to a large number of jobs in all sectors of activity, or to access to education or vocational training. This type of discrimination is most likely to be practised by the State or the public authorities. Although its effects are felt more in the public services, they are not confined thereto, partly because the distinction between public and private sectors is becoming increasingly blurred. In the public service, especially as regards highly responsible posts or positions of trust, a certain obligation of neutrality and loyalty can be required without, however, nullifying the protection afforded by the Convention.

47. The general obligation to conform to an established ideology or to sign an oath of political allegiance would be considered discriminatory; however cases in which the ground of political opinion is taken into consideration as a prerequisite for a given job should be objectively examined, under judicial scrutiny, to determine if this prerequisite is really justified by the inherent requirements of the job.

2. *Other grounds of discrimination*

48. In addition to the seven grounds of discrimination referred to above, which represent the minimum standard on which agreement was reached, Convention and Recommendation No. 111 provide that "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [...] may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies" (Article 1, paragraph 1(b), of the Convention and Paragraph 1, subparagraph (1)(b), of the Recommendation) within the framework of a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation. This participation of employers' and workers' organizations, either directly or through a specialized body, is of particular importance since it provides an additional guarantee of the acceptance and implementation of national policies adopted in accordance with the Convention.

49. So far none of the countries that have ratified the Convention has stated expressly that other grounds have been determined under the Convention. However, grounds other than those set forth in the Convention have been laid down in the provisions of national constitutions, legislation and regulations intended to eliminate discrimination in employment and occupation. Following a dialogue with certain governments, the Committee has therefore accepted their view that other grounds of discrimination are covered by the Convention in their countries. It is impossible to draw up an exhaustive list of grounds that can serve as a basis for discrimination; and new ones are likely to emerge and become widespread in future; a number of grounds currently invoked or covered by protection under other ILO standards will be discussed below.

50. Grounds such as pregnancy and maternity are now considered to be already partly or entirely covered by the ground of sex set out in Article 1, paragraph 1(a), of the Convention. Other grounds, such as age, disablement and family responsibilities, are covered by Article 5, paragraph 2, as an example of special measures of protection or assistance which are not deemed to be discrimination. Membership or non-membership in a trade union were proposed as grounds during the preparatory work for the 1958 instruments; they were rejected, but have been included in other Conventions (see paragraph 243 below).

51. New grounds have also been incorporated in national legislation since the Convention was adopted, including criminal indictment or conviction; criminal record; convictions that have been pardoned; educational level; place of birth; legitimacy or illegitimacy of parentage; sexual orientation; state of physical or mental health; medical history; family relationship with other workers in the enterprise; accent; physical appearance; status with regard to public assistance; atypical hereditary cellular or blood trait, et al.

52. The emergence of new grounds of discrimination that are not explicitly set forth in Article 1, paragraph 1(a), of the Convention shows that there is a need for regulation, which can be met, at the international level, by the adoption of more specific standards. Three Conventions have therefore been adopted by the ILO on such grounds since the adoption of Convention No. 111: the Workers with Family Responsibilities Convention, 1981 (No. 156), the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and the Part-Time Work Convention, 1994 (No. 175). Hence the special importance of Article 1, paragraph 1(b), of the Convention.

(a) Workers with family responsibilities

53. Family responsibilities can be a barrier to equality in employment and a major source of direct or indirect discrimination against women. The Conference recognized that "in order to make women's right to work outside the home without discrimination fully effective [...], [e]ducational and promotional measures should be taken as necessary and appropriate to encourage a more equitable sharing among family members of household tasks".[3] In paragraph 3 of its 1978 General Survey of the reports relating to the Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123), the Committee emphasized that "all measures promoting equal rights may prove meaningless for a vast proportion of women if — as a result of their family responsibilities — they must either give up their jobs entirely, or lose any chance of advancement because they can give only a smaller part of their attention and energy to their professional work".[4]

---

[3] Resolution concerning a plan of action with a view to promoting equality of opportunity and treatment for women workers, adopted on 25 June 1975 by the ILC, Part I, 8(1) and (2).

[4] ILO General Survey of the Committee of Experts on Conventions and Recommendations relating to the Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123), Report III (Part 4B), International Labour Conference (ILC), 64th Session, Geneva, 1978, para. 3.

54. The profound changes that have shifted the emphasis from protecting women in employment to improving their employment prospects have led to the belief that equality requires that women and men be treated equally in every field, including that of protective legislation;[5] these changes were reflected in the adoption in 1981 of the Workers with Family Responsibilities Convention, 1981 (No. 156), which concerns both sexes. The adoption of these instruments marked a shift in traditional attitudes concerning the role of women, and a recognition that family responsibilities affect not only women workers but the family and society as well. Under this Convention, all of these workers should enjoy effective equality of opportunity and treatment, not only between men and women workers with family responsibilities, but between these and other workers. The Convention's aim is for each State to enable workers with family responsibilities to engage in employment without discrimination, and, to the extent possible, without conflict between their employment and family responsibilities.[6]

(b) Disabled persons

55. Persons with physical or mental disabilities often face difficulties in taking part in social life on an equal footing with others. These difficulties include specific elements of discrimination as regards access to employment or vocational training, and such workers may be subjected to a rigid or condescending attitude, segregated, or even denied entry to an occupation. The formulation, implementation and periodical review of a policy on the vocational rehabilitation and employment of disabled persons, based on the principle of equal opportunity between disabled workers and workers generally, is the objective of the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159).

56. For the purposes of this Convention, the term "disabled person" means "an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment" (Part I, Article 1, paragraph 1). Equality of opportunity and treatment between disabled men and women workers must naturally be respected, since the latter run the risk of being subjected to serious discrimination on double grounds. The Convention also provides that "special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers" (Part II, Article 4). This provision corresponds to the principle set forth in Article 5, paragraph 2, of Convention No. 111. In the context of the two Conventions, the concept of protection or assistance to remedy clear cases of discrimination is allied to that of equality of opportunity and treatment.

---

[5] In this regard see article 9, paragraph 2, of the Declaration of Equality of Opportunity and Treatment for Women Workers, adopted on 25 June 1975.

[6] For a detailed description of this instrument, see *Workers with family responsibilities*, the General Survey of 1993, ILC, 80th Session.

(c) State of health

57. There is no doubt that health must be taken into consideration when evaluating an individual's aptitude for a particular job taking account of the principles of protection of public health, in appropriate cases. However, physical or mental state of health should not be considered *a priori* to be an essential aspect of the employment relationship. An analysis of whether it is essential should be made based on the relationship between the person's current state of health and the normal occupational requirements for the exercise of a particular job.

58. The determination and implementation of a policy designed to promote equality of opportunity and treatment sometimes involve an examination of the consequences that the past or present state of health of a person or group of people may have on access to and the exercise of employment and an occupation.

59. In doing so, great care must be taken with regard to divulging a worker's medical history and making it compulsory for persons who have suffered from specific illness (mental illness, cancer, tuberculosis, etc.) to provide guarantees as to their current state of health. Such requirements, if not abolished outright, must at least be restrictively applied with due regard for their confidential nature. Moreover, an individual should not bear the burden of proof concerning the consequences of physical or mental illness, past or present, on his or her fitness for work.

60. As regards the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS), a tendency has been noted among employers to screen workers systematically and without their knowledge, either prior to recruitment or as part of regular occupational health examinations. There is no doubt that such practices open the way to discrimination regarding access to and retention of employment. Protective provisions are therefore indispensable in this regard, in order to prohibit the screening of workers without their knowledge as well as to maintain the confidentiality of the results of examinations that may be carried out for reasons of public health. Individuals subjected to screening should always be informed of the results. When a worker is diagnosed as HIV-positive there will be repercussions — most often negative — on relations at work, both with employers or immediate supervisors and with colleagues. Measures to provide information on how the virus is transmitted and a public awareness campaign could be an adequate means of eradicating prejudice and misconceptions regarding HIV-positive individuals. Although this is a task for the public authorities, a great deal can also be accomplished at the enterprise level. Reference may be made to the statement on HIV and AIDS in the workplace drafted by the World Health Organization (WHO) in association with the ILO in June 1988 concerning the components of a policy of non-discrimination in employment.[7]

(d) Age

61. Generally speaking, age is considered to be a physical condition for which there are particular needs and in respect of which special protection or assistance is recognized as being necessary, in accordance with Article 5, paragraph 2, of Convention No. 111. However, the question of age, and of older workers in particular, should also be examined from the standpoint of promoting equality of opportunity and treatment.

62. At the national level, labour codes and specific legislation in many countries expressly prohibit discrimination on the basis of age. These provisions, however, must be read in conjunction with provisions whereby employers may lawfully terminate the employment of workers who have reached retirement age. In addition, with increasing frequency, when workers reach their 40s, they encounter great difficulties in finding new employment if they lose their jobs as a result of the economic recession, in industrialized countries. Upper age limits that are set for access to certain categories of employment should be periodically re-examined in the light of medical advances to determine whether they are justified. There is no discrimination where an employer can prove that age is an occupational requirement justified by the nature of the job, although exclusively economic arguments do not constitute justification. Discrimination on the basis of age should be seen mainly in relation to the compulsory retirement age and the conditions of employment of elderly and of young workers. The current trend in the industrialized countries is towards a more flexible approach to the compulsory retirement age.

(e) Trade union membership

63. Membership or non-membership in a trade union organization can give rise to discrimination, as can the existence of trade union security clauses. The Conference decided in 1958 that the protection accorded by the Convention would not extend to this ground. The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), recognizes the right of all workers and employers, without distinction whatsoever, to establish and join trade unions and to participate in trade union activities, without interference. Discrimination on this ground is, however, prohibited in the Workers' Representatives Convention, 1971 (No. 135) (Article 1), and the Labour Relations (Public Service) Convention, 1978 (No. 151) (Article 4, paragraph (2)), as well as in others, such as the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117).

64. In addition, Article 3(a) of Convention No. 111 provides that each member State shall seek the cooperation of employers' and workers' organizations in promoting the acceptance and observance of the national policy to promote equality. States can therefore neither permit nor countenance discrimination in the field of trade union rights, because one aspect of the desired cooperation is in fact the elimination of discriminatory practices vis-à-vis and by trade unions.

---

[7] WHO/GPA/INF/88.7/Rev.1.

CHAPTER 2

Fields covered by the Convention: Access to training, occupation and employment, terms and conditions of employment

65. Article 1, paragraph 3, of Convention No. 111 provides that the terms "employment" and "occupation" include access to vocational training (section A), access to employment and to particular occupations (section B), and terms and conditions of employment (section C). The protection provided by the Convention is not limited to the treatment accorded to a person who has already gained access to employment or to an occupation. It is expressly extended to the possibilities of gaining access to employment or to an occupation and also covers access to training, without which there is no real possibility of entering employment or an occupation.

66. Recommendation No. 111 illustrates these concepts in more detail. Under Paragraph 2(b):

> all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of:
>
> (i) access to vocational guidance and placement services;
>
> (ii) access to training and employment of their own choice on the basis of individual suitability for such training or employment;
>
> (iii) advancement in accordance with their individual character, experience, ability and diligence;
>
> (iv) security of tenure of employment;
>
> (v) remuneration for work of equal value;
>
> (vi) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment.

No discrimination in respect of hiring, training, advancing, retaining a worker in employment or the fixing of terms and conditions of employment should be practised or countenanced by employers (Paragraph 2(d) of the Recommendation).

67. Under Article 3 of the Convention the public authorities must, in all their activities, apply the national employment policy, provided for in Article 2 of the Convention, free of all discrimination and, in particular, ensure the application of the principles of non-discrimination in respect of employment under the direct control of a national authority and in the activities of vocational guidance, training and placement services under this direct control. They must also promote their application in other sectors of activity.

68. The legislation of some countries recognizes equality of opportunity and treatment, without discrimination, in access to education, employment and occupation, as a right which each individual can enforce by judicial proceedings.

A. Access to training and vocational guidance

69. Training and vocational guidance are of paramount importance in that they determine the possibilities of gaining access to employment and occupation. Discriminatory practices with respect to access to training are subsequently perpetuated and aggravated in employment and occupations.

1. Training

70. Considerable importance is attached to vocational training, which determines the actual possibilities of gaining access to employment and occupations. Very frequently it is because of inequalities in vocational training that equality of opportunity and treatment is impaired or nullified in all other areas. The term "vocational training" applies to all forms of employment and occupations; it should not be interpreted in a narrow sense such as apprenticeship or technical education. In so far as the completion of certain studies is necessary to obtain access to any given employment or occupation, or to some specialized form of vocational training, the problems relating thereto should not be overlooked in the application of the 1958 instruments.

71. If the population as a whole cannot benefit from a general education, a part of the population is unable to acquire more specialized training and to hold jobs that are as productive as possible. If parts of the population are prevented from attaining the same level of education as others, this constitutes discrimination within the terms of the Convention, since these differences will be extended into employment opportunities. Similarly, discriminatory practices affecting access to training or the quality of training will be perpetuated or aggravated when the persons who have suffered such discrimination compete for places in the vocational training systems and, consequently, in employment and occupation. Thus access to training, including the elimination of illiteracy, must be promoted without discrimination on the basis of sex, race, national extraction, social origin or other grounds. Universal education, compulsory and free of charge to the same level for everyone, is one of the basic starting-points for a policy to promote equality of opportunity and treatment in employment and occupation.

72. Some national provisions, generally embodied in constitutions, prohibit discrimination based on grounds that may be narrower than those specified in Convention No. 111. Their scope is often also confined to the country's own citizens. In addition, a distinction may be made between texts intended specifically to govern education and those enacted to give effect to equality of opportunity and treatment, such as human rights legislation. The former usually cover a wider range of grounds of discrimination, whilst the latter are generally limited to grounds such as sex or race.

73. In practice, discrimination in access to training may take two forms: either rejecting or deliberately omitting to accept a person's application to be admitted as a pupil, student or trainee; or else setting admission requirements that lead to the exclusion of candidates on grounds referred to in the Convention. Discrimination in this area rarely originates in provisions of laws or regulations that are directly discriminatory. It generally arises out of practices based on stereotypes affecting mainly women and certain disadvantaged and minority groups. The positive measures taken to give effect to the national policy referred to in Article 2 of the Convention thus take on particular importance as they make it possible to rectify the de facto inequalities affecting the members of these groups that are at a disadvantage owing to the phenomenon of occupational segregation. The promotion of equality of opportunity and treatment in respect of training also applies to the actual process of training. Some national provisions stipulate that it is prohibited to terminate training on certain specified discriminatory grounds, or that it is unlawful deliberately to restrict or to deny a person any benefits, facilities or services to which he or she is entitled in a training establishment.

2. *Vocational guidance*

74. As a general rule, the purpose of vocational guidance is to give those young people and adults who may need it professional assistance in choosing an occupation, using a variety of methods, such as the dissemination of information about occupations, the preparation of recommendations in the light of personal aptitudes and social needs, and the joint participation of teachers and parents in fostering the child's choice of an occupation.

75. Vocational guidance is intended to play an important role in opening a wide range of occupations free of considerations based on stereotypes and archaic attitudes according to which, for example, certain trades or occupations are reserved for a particular sex. This makes it possible to promote a genuine policy of equality of opportunity. Mention should be made here of the Human Resources Development Recommendation, 1975 (No. 150), which provides for the adoption and development of policies and programmes of vocational guidance and vocational training for all persons, on an equal basis and without any discrimination whatsoever. It calls on member States to aim at ensuring that all have equal access to vocational guidance and vocational training. In respect of particular groups (illiterate or uneducated persons, older workers, linguistic and other minority groups, and disabled persons) it provides that measures should be taken to enable them to enjoy equality in employment and improved integration into society and the economy. It also encourages the adoption of measures to improve the employment situation for women and promote their equality of opportunity in employment and in society as a whole.

76. There may also be elements of discrimination in the vocational guidance and vocational training provided to ethnic groups, which should be carried out with due consideration for their particular needs, as provided in the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Although it is necessary, as this Convention recognizes, to adapt programmes of vocational guidance and vocational training to the needs of indigenous and tribal peoples, it is just as important not to confine such guidance and training to the traditional areas of activity considered appropriate for them. This approach is also valid for other ethnic groups and minorities.

77. Two points should be borne in mind for genuine equality of opportunity in employment and occupation: information systems designed to extend the range of occupational choices for girls and boys, and the role of guidance tests in the choice of a trade or occupation. The admission of girls to technical training courses and the adoption of measures to encourage them to consider also training for traditionally "male" jobs, enhance equality of occupational opportunities for women. Vocational guidance tests are defined as appropriate tests of capacity and aptitude — including both physiological and psychological characteristics — and other methods of examination for use in vocational guidance (see Paragraph 13 of Recommendation No. 150 mentioned above). They should not perpetuate discriminatory practices that emphasize social, cultural or linguistic characteristics that are not related to the qualifications required for a particular job. Guidance tests should have a genuine and reasonable relationship to the type of training to be undertaken and the activity that will eventually be performed by the candidate. They should not contain any features that might lead to indirect discrimination based, for example, on sex or social origin.

B. Access to employment and to particular occupations

78. Referring to the promotion of equality of opportunity and treatment in respect of employment and occupation, the Convention deals not only with access to wage-earning employment, but with independent work as well.

79. "Occupation" means the trade, profession or type of work performed by an individual, irrespective of the branch of economic activity to which he or she belongs or of his or her professional status. "Persons in employment" means "all persons above a specified age who are at work", and "work" includes not only "persons with the status of an employee", but also persons whose status is that of a "worker on own account", an "employer" or an "unpaid family worker". The scope of the Convention is very broad, extending to all sectors of activity and covering employment in both public and private sectors.[1]

---

[1] General Survey of 1988, para. 86, citing ILO discrimination in the field of employment and occupation, Report IV(1), ILC (42nd Session, 1958), Appendix.

80. Activities under the direct control of the public authorities are dealt with in Article 3(d) of the Convention and Paragraph 2(c) of the Recommendation. Under these provisions member States are to pursue a national policy designed to promote equality of opportunity and treatment in respect of employment under their control. Government agencies are therefore under an obligation to apply non-discriminatory employment policies in all their activities. However, the 1958 instruments leave it to the States to determine the nature of the legal relationship of persons employed in the public service, subject to the requirements inherent in each particular job or occupation. The adoption of a special form of legal relationship by a national legal system should not have the consequence of depriving persons subject thereto of the protection provided for by the Convention.

81. Obviously, protection against discrimination in employment and occupation should not be limited by a restrictive definition of the concept of access to employment. No employment and no occupation is excluded from the scope of the Convention, which covers, inter alia, placement as well as access to non-wage work, to wage employment, to the public service and to employers' and workers' organizations.

1. Access to wage employment

82. The application of the principle of equality of opportunity and treatment guarantees that every person has the right to have his or her application for a chosen job considered equitably, without discrimination based on any of the grounds referred to in the Convention. It does not give every person the right to the job of his or her choice, irrespective of his or her professional qualifications or other conditions. The recruitment procedure and the statement of reasons in the event of an adverse decision on the application are of considerable importance for the effective application of this right. A candidate who has been eliminated should be allowed access to written information relating to the training, practical experience and other easily identifiable qualifications possessed by the person who has been appointed to the post, especially if the post has been advertised publicly.

83. The employer should only apply objective recruitment criteria in his or her choice of a candidate. Requirements as to weight, height or physical strength should not be considered as objective criteria except in so far as they are requirements necessary to the performance of a particular activity. Moreover, inquiries into the worker's political, religious or trade union opinions should not extend beyond what is referred to in Article 1, paragraph 2 (see above).

84. As a general rule, data contained in personnel files must be safeguarded in such a way that the workers' privacy is respected. There are several ways of achieving this: prohibition of keeping personnel files beyond a certain time; prohibition of disclosure of certain information; submission of the personnel file to the worker in order that he or she may satisfy himself or herself that the data do not contain any incorrect information or any matter unrelated to the requirements of the job, etc.

85. Mention should be made here of so-called "statistical discrimination", which can be described as the reluctance (tantamount to prejudice) of employers to employ certain persons by reason of characteristics thought to be "typical" of the group to which they belong. The widespread acceptance of the assumption that there are differences in productivity between men and women, for instance, is the basis for the statistical discrimination practised against women, which in turn contributes to occupational segregation in two ways. First, the belief shared by employers that men and women have different levels of productivity can cause them to favour one sex over the other for a specific task, and this sustains discriminatory distinctions between trades and occupations considered to be "typically male" or "typically female". Second, if the employer expects women to be more likely than men to leave their jobs, in order to raise their children for example, he or she will recruit them in a short-term perspective, mainly for positions requiring little or no training, or with training that is paid for by the workers themselves.

86. This type of occupational segregation can also arise from enterprise recruitment policies of deliberately limiting the number of women recruited — which run counter to the policy of equality between the sexes defined by the national authorities. Although they do not always coincide, this form of segregation is correlated with the uneven distribution of men and women in the upper ranks of the enterprises. In an attempt to counter this phenomenon quotas are sometimes set for women. In some countries an equal status subsidy is paid to employers who recruit a woman for a job traditionally regarded as a "male" occupation and vice versa. As regards employment advertisements, certain countries have adopted legislative provisions banning the mention, in such advertisements, of requirements based on any of the criteria of discrimination prohibited by the Convention and not related directly to the inherent requirements of the job. The Committee has addressed comments to certain governments concerning this question.

87. The prohibition of forced or compulsory labour laid down in the Abolition of Forced Labour Convention, 1957 (No. 105), "as a means of political coercion ... or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system" (Article 1(a)) and "as a means of racial, social, national or religious discrimination" (Article 1(e)) shows that Convention No. 105 anticipated the grounds set forth in the 1958 instruments.

88. In this connection, the struggle against discriminatory measures in respect of the recruitment of indigenous and tribal peoples should not be forgotten. It is true that these peoples are not the only groups in a national society to be subjected to discrimination by means of coercion or improper practices in recruitment and employment. Nevertheless, in the past, and still today, they have been particularly likely to be victims of discrimination of this kind. In some countries serfdom, debt bondage and other types of compulsory service, although formally abolished by law, are still practised in respect of indigenous and tribal peoples, and sometimes affect other disadvantaged groups as well.

2. Access to non-wage work

89. The transition of certain countries towards a market economy and the structural adjustment policies being applied in developing countries (where over 80 per cent of the active population may be involved in non-wage work) have given rise to a category of non-wage-earners. These persons are usually covered by general legal provisions relating to equality before the law laid down in national constitutions. The provisions of labour codes are usually applicable only to wage-earners, and do not always cover non-wage-earners, who therefore do not enjoy such extensive protection.

90. This category of the labour force ranges from farmers to lawyers to craftsmen. Its heterogeneity is reflected in a wide variety of practical conditions governing access to these activities and, hence, of requirements in respect of non-discrimination. Some common characteristics can, however, be discerned for purposes of effective equality of access to these occupations. There should be no discrimination in access to the material goods and services (land, investment credit, etc.) required to carry on the occupation in question (in some countries, single women with no dependents cannot own land, and in others, such as those in transition towards a market economy, some persons — especially those with connection to the previous political regime — have unjustified privileges for access to land or credit) which may result in discrimination against those less well-placed. Discrimination, especially on the basis of sex, arising from rules concerning marital or personal status must be countered, as in the cases where the inheritance system excludes certain categories of persons or where the right to enter into contracts is restricted by a requirement for the authorization of a third party (for example, family law in some countries requires a married woman to have her husband's consent in order to carry on a professional activity and perform the related transactions).

91. Seemingly neutral requirements that govern the possibility of acceding to or carrying on an occupation may involve indirect discrimination based on one of the grounds referred to in the Convention. This is the case where the possession of certain diplomas issued by specified institutions or the fulfilment of special conditions is required for access to such varied occupations as those of hairdresser, lawyer, medical practitioner and midwife. These requirements, while applied uniformly to all candidates, nevertheless result in debarring certain persons from the occupation in question on the basis of national extraction or sex, if these persons cannot meet the conditions to obtain the necessary training. Where the exercise of an independent activity or a liberal profession is conditional on possession of a licence or title issued by a national authority or by an autonomous professional body, the authority or body must be completely objective in examining the varying professional qualifications of the different candidates.

3. Placement

92. An efficient public employment service can be an essential element of a policy to promote equality of opportunity and treatment in occupation. The principle of equality laid down in national constitutional and legislative provisions should apply to placement services in the same way as to any other public service.

93. In countries where there are private employment agencies, these should observe the policy for the promotion of equality required by the Convention. Legislative provisions should specify the kind of information that may be recorded by these agencies and communicated by them to employers, and should indicate in what form it may be recorded and communicated. Penalties, such as the withdrawal of the licence, should be applicable in the event of failure to observe the principles established by the State in respect of equality.

94. In its practical daily activities and its relations with users, the employment service should not confine itself to respecting merely the negative aspect of the principle of non-discrimination — that is to abstain from practising discrimination — but should also act in the positive sense of developing effective equality in employment. Under Article 3(e) of the Convention, the observance of the national policy to promote equality of opportunity and treatment in employment must also be ensured in the activities of placement services under the direction of a national authority.

4. Access to the public service[2]

95. In so far as the State as an employer must abide by the principles whose observance it is to promote, and given the volume of state employment, the public sector plays a key role in the general implementation of the national policy to promote equality of opportunity and treatment in employment.

96. The most common — and often the only — prohibited ground of discrimination mentioned in public service regulations is sex. It is important to emphasize the current trend towards the removal of the restrictions on access to certain state posts which still affect women in many countries. Likewise, disparities in remuneration are beginning to be gradually eliminated.

97. It is commonly stated that the right to enter and to make a career in the public service is, for all or some of the posts, based on merit, qualifications or aptitude, which are tested by means of a procedure of competitive examinations. The competitive examination procedure corresponds to the government's concern to obtain the services of the most highly qualified officials and ultimately to establish the grading system which is indispensable in any public administration. Therefore, where this has not already been done, it would be desirable for provisions relating in particular to competitive examinations and tests to be reviewed in the light of equality of opportunity and treatment without discrimination, as provided for in the Convention.

---

[2] See also para. 125 and ff.

98. The reasons for a decision to refuse or reject a candidate are extremely important so that the authority's decision can be effectively monitored. In several countries, independent bodies are responsible for applying the rules governing access to the public service, and they have extensive powers with regard to competitive examinations and appointments to public posts. These bodies must respect the provisions of Convention and Recommendation No. 111 and ensure the application of the principle of equality of opportunity and treatment in access to the public service. Where their decisions do not need to be supported by a statement of reasons and cannot be appealed against there are definite risks of discriminatory practices. Therefore, in order to ensure equality in access to public employment appeals should be possible against such decisions on the basis of anti-discriminatory legislation or regulations which should mention all the grounds specified in the Convention. It is particularly important that appeal mechanisms be available to persons who are wrongfully denied access to a post for security reasons based on an unlawful discriminatory ground such as national extraction, social origin or religion. Political opinion is another ground that can easily be abused.

99. A direct appointment procedure in conjunction with security checks, instead of a recruitment procedure based on the candidate's merit or qualifications, is applicable to confidential or managerial posts and to positions that are sensitive from the point of view of state security. Security measures of this kind should only be authorized and undertaken when this is justified by the inherent occupational requirements of the post in question.

5. Access to employers' and workers' organizations

100. Paragraph 2(f) of Recommendation No. 111 provides that "employers' and workers' organizations should not practice or countenance discrimination in respect of admission, retention of membership or participation in their affairs". The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), specifies that "workers and employers, without distinction whatsoever, shall have the right to establish ... organizations of their own choosing". Difficulties in joining and retaining membership of an organization could arise from restrictions relating, for example, to race, national extraction, sex, opinion and political affiliation and activities.

101. In respect of discrimination based on sex, it should be emphasized that whilst the rising participation rate of women in employment has brought about an increase in the number of women members in workers' and employers' organizations, much still remains to be done especially as concerns access to higher posts in these organizations. It is for these organizations to take the necessary measures to eliminate practices that may lead to direct or indirect discrimination based on any of the grounds mentioned in the Convention, both in respect of admission to and retention of membership, and in respect of participation in the activities of trade unions or employers' organizations.

C. Terms and conditions of employment

102. In Article 1, paragraph 3, of Convention No. 111, the terms "employment" and "occupation" include terms and conditions of employment. The concept of terms and conditions of employment is defined in Recommendation No. 111, which lists the following areas: advancement in accordance with individual character, experience, ability and diligence; security of tenure of employment; remuneration for work of equal value; and conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment. The concept of terms and conditions of employment is thus very broad.

1. Advancement

103. The right of any person not to suffer discrimination on the basis of the grounds mentioned in the Convention also relates to advancement earned in the course of employment.

104. One of the conditions for the exercise of this right is a knowledge of the rules and criteria governing the selection and choice of the persons who may be promoted. Except in the case of the public service, the rules and criteria governing advancement are rarely stipulated in laws or regulations. Sometimes enterprise rules or collective agreements lay down broad criteria, which usually include performance, qualifications, merit, length of service, experience and training acquired, as well as fitness to perform the tasks involved in the new post. The equitable application of most of these criteria should not lead to direct discrimination in advancement. Nevertheless, in order to avoid indirect discrimination, it may be necessary to review, in the light of the Convention, the choice and weighting of the elements to be taken into consideration in evaluating merit and qualifications.

105. For a system of advancement to be free of discrimination it must first eliminate vertical occupational segregation which, while principally affecting women, also has an impact on visible minorities characterized by race, colour or national extraction, as well as certain minority groups whose distinctive characteristic is their religion or social origin. In many countries, there is an emphasis on *unbroken* service in selection for advancement or promotion, which may have a particular impact on women in employment. The method of calculating length of service can lead to distinctions being made which are detrimental to women's opportunities for advancement, in particular where interruptions of working life in connection with pregnancy or motherhood are not taken into consideration when calculating length of service. Specific provisions can be adopted to remedy these forms of indirect discrimination by stating, for example, that absences from work because of pregnancy or confinement or related illnesses shall be treated as periods of employment for advancement purposes.

2. *Security of tenure*

106. In the context of the promotion of equality of opportunity and treatment in employment, security of tenure denotes a guarantee that dismissal will not occur on discriminatory grounds, but must be justified by reasons relating to the operational requirements of the enterprise, the worker's conduct or his or her ability or fitness to carry out his or her duties.

107. The Termination of Employment Convention, 1982 (No. 158), and Recommendation No. 166 which supplements it, deal with termination of employment at the initiative of the employer. These texts, which are of general application, stipulate that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" (Article 4), it being specified that "race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin" shall not constitute valid reasons for termination (Article 5(d)). These provisions include all the grounds of discrimination prohibited by Convention No. 111, and others. In its General Survey on this Convention,[3] the Committee recalled that it had commented on the application of Convention No. 111 in relation to dismissals based on certain grounds of discrimination that constitute invalid reasons for termination of employment under Article 5(d) of Convention No. 158. Protection against termination based on reasons of a discriminatory nature has increased markedly over recent years. For example, protection against termination of employment during pregnancy or maternity leave is now provided in the legislation of a growing number of countries.[4] The Committee considers that protection against termination on the ground of pregnancy or absence for maternity leave constitutes one of the essential elements of a policy of equality in employment and occupation.

108. As regards collective dismissals for economic reasons, protection against discrimination should also relate to indirect discrimination resulting from the criteria established to determine the order of dismissals. It is necessary to ensure that conditions that appear to be neutral, that are included in collective agreements and that are applied across the board, do not in fact lead to indirect discrimination affecting one of the categories of persons characterized by one of the grounds referred to in the Convention. Women are particularly affected when the rule of "last in, first out" is applied; and in sectors where they have only recently gained access to the workplace, the effect on women may be particularly significant. The Committee emphasized in its above-mentioned General Survey that it is important for the choice of the workers to be affected by a collective dismissal to be made as objectively as possible in order to avoid any risk of reaching arbitrary decisions, and that, as advocated in Recommendation No. 166, these criteria should be established in advance.[5] The criteria most often applied relate to occupational skills, length of service, family circumstances and even to the difficulty of finding alternative employment.[6] Inequitable treatment of men and women, and of disadvantaged categories of workers, can arise from the application of such measures, in particular in the current increasingly frequent situations of economic crisis, in which countries face structural adjustment problems, unemployment, underemployment and the demands of increased competitiveness as a result of globalization of the economy.

---

[3] *Protection against unjustified dismissal*, General Survey, International Labour Conference, 82nd Session, 1995.

[4] ibid., para. 374.

109. Another important aspect of security of tenure is protection against retaliatory measures taken against a person who has lodged a complaint with a competent body or instituted legal proceedings to ensure respect for his or her rights with regard to equality of opportunity and treatment, or who is a party to such proceedings, for example as a witness. Any retaliatory measure taken in cases of this kind, in particular in the brutal form of termination of employment, is particularly serious and can have pernicious effects as regards the practical application of anti-discriminatory provisions, since persons who suffer discrimination, or who witness it, often hesitate to have recourse to remedies out of fear of reprisals.

3. Equal remuneration

110. The principle of equal remuneration for men and women affirmed in the Preamble to the Constitution of the ILO is established in the Equal Remuneration Convention, 1951 (No. 100), for work of equal value, as well as in its accompanying Recommendation (No. 90). It is also covered by Recommendation No. 111, Paragraph 2(b)(v) and (vi) of which concern the formulation and application of the national policy of equality in employment and occupation for all, without discrimination.

111. Paying women at a lower rate than men for either the same work or work of equal value is a typical feature of the sort of discrimination that still exists. The principle underlying Convention No. 100 may lead to improvements as it establishes the groundwork for equality between men and women. The gap between the earnings of men and those of women with comparable qualifications often occurs because women are more likely to be employed in the branches of activity and the jobs that are the least well paid even though the work is of equal value. In addition, differences affecting women's careers usually reflect the difficulty of reconciling work and motherhood. Putting an end to occupational segregation, tackling the problem of undervalued "women's jobs", and ensuring equality for workers with family responsibilities, are measures that need to be fully implemented, not only within the context of Convention No. 111, but also in that of Convention No. 156.

---

[5] ibid., para. 335.

[6] ibid., para. 337.

112. The principle of equal remuneration without discrimination based on grounds such as race, colour, national extraction, social origin, religion or political opinion is laid down in many labour codes. However, differences in pay reveal a situation of inequality, the causes of which often lie in external factors such as access to education, vocational guidance and vocational training, etc. (see paragraphs above on these subjects). These differences become apparent when national employment statistics are made available.

4. Social security

113. Under Article 5 of the Convention, distinctions in respect of employment-related social security, to the extent that they do not constitute a special measure of protection or assistance provided for in other international labour Conventions or are generally recognized as necessary, constitute unlawful forms of discrimination. Any discriminatory treatment in respect of benefits or of conditions of entitlement to social security, the application of compulsory or voluntary statutory or occupational schemes, contributions and the calculation of benefits should be eliminated.

5. Other conditions of employment

114. Measures to protect workers' privacy play a part in the application of the principle of equality of opportunity and treatment in employment and occupation. A draft code of practice on the protection of workers' personal data elaborated by the International Labour Office will be submitted for discussion during a meeting of experts on the subject in the future. The draft code states that "the processing of personal details should not impact negatively upon equality of opportunity and treatment in employment and occupation by establishing distinctions, exclusions or preferences based on race, colour, sex, religion, political opinion, national extraction or social origin". As a general rule, employers should not collect details concerning the sex life, the trade union membership or activities, or the political, religious or other opinions of workers. Medical details should remain confidential and tests unrelated to job requirements should not be permitted. The draft code stresses furthermore that: "it is important to apply strictly the general principle of non-discrimination in employment to avoid personal details directly or indirectly resulting in individual or collective discrimination". The Committee considers it both important and useful to emphasize that the collection, storage, communication and retaining of workers' personal details by employers, when necessary, should be carried out in accordance with guidelines such as those indicated in the draft code referred to here.

115. Part-time work has increased considerably in recent years; now that employment problems in many countries have made it a widespread phenomenon, it should be protected. It mainly concerns women workers, young workers and older people, but is now also beginning to affect an increasing number of men in the industrialized countries. The Part-Time Work Convention, 1994 (No. 175), provides that measures should be adopted to guarantee these workers the same protection in respect of discrimination in employment and occupation as that accorded to comparable full-time workers (Article 4(c)). Part-time work is not always a choice: often it is the only work available; many women workers with family responsibilities work on a part-time basis because it is the only way for them to reconcile their need to work and their family responsibilities. Part-time work is often poorly remunerated; other typical features include the absence of security of tenure and of the right to paid leave and other social benefits, the lack of advancement and pay increases on the basis of length of service, and irregular hours of work. It is therefore all the more important to apply Convention No. 111, as stipulated in Article 4 of Convention No. 175.

116. The principles of non-discrimination are also to be applied as regards occupational safety and health. Women and men should be protected from risks inherent in their employment and occupation in the light of advances in scientific and technological knowledge.[7] In this area, protective legislation applying to women should be updated and the measures to reduce hazards to workers' health should be adopted in line with an egalitarian approach. It is also the duty of the enterprise to make every reasonable effort to create a safe working environment and safe working conditions for both men and women workers.

---

[7] Resolution on equal opportunities and equal treatment for men and women in employment, adopted by the ILC in 1985.

CHAPTER 3

Measures not deemed to be discrimination

117. Not all distinctions, exclusions or preferences in employment and occupation are deemed to be discrimination. Convention and Recommendation No. 111 set aside three categories of measures which "shall not be deemed to be discrimination": those based on the inherent requirements of a particular job; those warranted by the protection of the security of the State; and measures of protection or assistance.

A. Inherent requirements of a particular job

118. Under Article 1, paragraph 2, of Convention No. 111, "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination". This exception must be interpreted restrictively. When qualifications are required for a particular job, it may not be simple to distinguish between what does and what does not constitute discrimination. It is often difficult to draw the line between bona fide requirements for a job and the use of certain criteria to exclude certain categories of workers. In order to determine the real scope of this exception, the following two points should be examined: first, the concept of "a particular job" and, second, the definition of "inherent requirements" of a particular job.

119. It appears from the preparatory work for the Convention that the concept of "a particular job" refers to a specific and definable job, function or task. The necessary qualifications may be defined as those required by the characteristics of the particular job, in proportion to its inherent requirements. A qualification may be brought to bear as an inherent requirement without coming into conflict with the principle of equality of opportunity and treatment. In no circumstances, however, may the same qualification be required for an entire sector of activity. Systematic application of requirements involving one or more of the grounds of discrimination envisaged by Convention No. 111 is inadmissible; careful examination of each individual case is required. Likewise, the general exclusion of certain jobs or occupations, such as work in agriculture, export processing zones or the public service, from the scope of measures designed to promote the principle of equality of opportunity and treatment is obviously contrary to the Convention.

120. As regards men and women, distinctions on the basis of sex may be required for certain jobs, such as those in the performing arts or which are perceived as involving particular physical intimacy; such a distinction may also be linked to special protection measures. These distinctions should be determined on an objective basis and should take account of individual capacities. However, the continuing exclusion of women from certain posts of authority merely because they are women and encounter negative prejudices is one of the measures to be eliminated by methods appropriate to national conditions and practice, under the 1958 instruments.

121. With regard to religion, national provisions can be found restricting jobs associated with a particular religion to persons of that religion. Provisions of this kind are generally deemed not to be discriminatory; however, this exclusion does not apply to all work performed for a religious organization (such as building maintenance, etc.).

122. Political opinions may in certain limited circumstances constitute a bona fide qualification for certain senior administrative posts, for example in those involving special responsibilities for the development of government policy. However, it is essential that this not be carried beyond certain limits — to be evaluated on a case-by-case basis — as such practices may then come into conflict with the Convention's provisions calling for the pursuance of a policy designed to eliminate discrimination on the basis of, inter alia, political opinion, in particular in respect of employment under the direct control of a national authority. In order to fall within the scope of the exception provided for in Article 1, paragraph 2, these criteria must correspond in a concrete and objective way to the inherent requirements of a given job or occupation.

B. Measures affecting an individual suspected of activities prejudicial to the security of the State

123. In accordance with Article 4 of the Convention, "any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice". As an exceptional clause, Article 4 must be applied strictly in order to avoid undue limitations on the protection which the Convention seeks to guarantee. Therefore, the scope of application of this clause requires precise definition.

124. First, measures not to be deemed discriminatory under Article 4 must be measures affecting an individual on account of activities he or she is justifiably suspected or proven to have undertaken. This clause is intended to prevent the protection of a policy of non-discrimination from being invoked by individuals who are in fact engaged in activities prejudicial to the security of the State. However, such measures must not be taken simply by reason of membership of a particular group or community, otherwise they are discriminatory.

125. Second, the exception provided for in Article 4 refers only to activities qualifiable as prejudicial to the security of the State, whether such activities are proved or whether consistent and precise elements justify suspecting such activities. Therefore, the expression of opinions or religious, philosophical or political beliefs is not a sufficient base for the application of the exception (it should be recalled that the protection of differences of opinion afforded by the Convention is not limited to established principles). If an individual propagates doctrines aimed at fundamental changes in the State's institutions, and, in so doing, does not resort to violent methods, he or she is not thereby excluded from the protection of the Convention. The clause is also designed to ensure that measures taken to protect the security of the State do not in fact run counter to the policy of non-discrimination, by setting the conditions and safeguards that must accompany such protective measures.

126. Consequently, measures intended to safeguard the security of the State within the meaning of Article 4 must be sufficiently well defined and delimited to ensure that they do not become discrimination based on political opinion or religion, which would defeat the Convention's primary objective, namely to promote equality of opportunity and treatment. Irrespective of whether the measures are based on "lack of loyalty", "the public interest" or "anti-democratic behaviour", among others, the application of such measures must be examined in the light of the bearing which the activities concerned may have on the actual performance of the job, tasks or occupation of the person concerned. Otherwise, there is a danger, and even likelihood, that such measures entail distinctions and exclusions based on political opinion or religion, which would be contrary to the Convention.

127. Measures to protect the security of the State exist in almost all countries; they may refer to situations such as martial law or a state of emergency, which are governed by provisions directly affecting employment or occupational issues. For example, convictions for acts undermining state security are frequently accompanied by a ban on work in certain sectors of activity, on the holding of public or elected office or on the exercise of certain occupations.

128. In addition to these substantive conditions set by Article 4 of the Convention, there is also a procedural condition to be respected by a government intending to invoke this exception: the right of the person affected by the measures "to appeal to a competent body established in accordance with national practice". The existence of this procedural guarantee constitutes a prerequisite for the legitimate application of Article 4, but is not sufficient in itself. The mere existence of this legal remedy does not dispense States from the obligation to respect the substantive conditions laid down in Article 4.

129. It is important that the appeals body be separate from the administrative or governmental authority and offer a guarantee of objectivity and independence. It must also be competent to hear the reasons for the measures taken against the appellant and to afford him or her the opportunity to present his or her case in full.

C. Special measures of protection or assistance

130. There are two kinds of special measures of protection and assistance envisaged in Article 5 of the Convention: measures of protection and assistance provided for in international labour Conventions and Recommendations, and measures taken after consultation with employers' and workers' organizations and designed to meet the particular requirements of persons who require special protection or assistance.

1. Measures provided for in international labour standards

131. Article 5, paragraph 1, of the Convention provides that the "special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination. This concerns, for instance, special measures which may be taken on behalf of indigenous or tribal peoples or disabled or older persons, as well as those designed to protect maternity or the health of women, and which are expressly recognized as non-discriminatory. Thus, the Conference's standard-setting activity cannot be considered as establishing or permitting discrimination within the meaning of the 1958 instruments. Consequently, the ratification and application of Convention No. 111 are not to come into conflict with the ratification or implementation of other instruments providing for special measures of protection or assistance.

132. For example, maternity protection, in the form of leave before and after confinement and protection from dismissal, is always necessary. In practice, however, maternity remains subject to discrimination when it is directly or indirectly taken into account in considering applications for employment or as grounds for termination. Maternity is a condition which requires differential treatment to achieve genuine equality and, in this sense, it is more of a premise of the principle of equality than a dispensation. Special maternity protection measures should be taken to enable women to fulfil their maternal role without being marginalized in the labour market.

133. In line with the approach of full equality between male and female workers, it should be recalled that certain provisions currently applicable to women to allow them to raise children or to care for them should increasingly be granted to men as well, in accordance with the spirit of the Workers with Family Responsibilities Convention, 1981 (No. 156). The fact that these advantages are no longer exclusively granted to women may tend gradually to make women more competitive on the labour market, as they would cease to be seen by employers as more costly than men.

2. *Measures designed to meet the particular requirements of certain persons*

134. Article 5, paragraph 2, of the Convention states that ""any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination". Paragraph 6 of the Recommendation provides that the application of the policy of non-discrimination should not adversely affect the special measures concerned.

135. In applying the 1958 instruments, it is important to ensure that the special measures concerned do in fact pursue the objective of offering protection or assistance. These special measures tend to ensure equality of opportunity and treatment in practice, taking into account the diversity of situations of certain persons, so as to halt discriminatory practices against them. These types of preferential treatment are thus designed to restore a balance and are or should be part of a broader effort to eliminate all inequalities.

136. Because of the aim of protection and assistance which they are to pursue, these special measures must be proportional to the nature and scope of the protection needed or of the existing discrimination. A careful re-examination of certain measures may reveal that they are conducive to establishing or permitting actual distinctions, exclusions or preferences falling under Article 1 of the Convention. For this reason, consultation with employers' and workers' organizations, where they exist, constitutes a significant guarantee when such measures are being formulated. Such consultation must ensure that a careful examination of the measures concerned has been undertaken before they are defined as non-discriminatory and that the representative employers' and workers' organizations have had an opportunity to express their opinions on the matter. Once adopted, the special measures should be re-examined periodically, in order to ascertain whether they are still needed and remain effective. It should be borne in mind that such measures are clearly of a temporary nature inasmuch as their objective is to compensate for imbalances resulting from discrimination against certain workers or certain sectors.

137. The following grounds may call for the adoption of special measures of protection or assistance: sex, age, disablement, or membership of an ethnic minority, or of indigenous and tribal peoples; this list is not exhaustive and must be adapted to national circumstances.

(a) Measures adopted on the basis of sex

138. Various measures adopted in favour of women have already been discussed in the course of this survey. There are essentially two kinds of measures intended to meet the special needs of women. Special measures adopted in accordance with Article 5(1) of the Convention are intended to protect maternity and against specific health risks; while measures more closely related to the concept of preferential treatment, provided for in Article 5(2), have been adopted by States with a view to remedying the effects of past discrimination exercised against women which limit their career prospects. These preferential measures concern different levels of needs: education and training, access to employment, conditions of work, promotion and entry or re-entry into working life.

(b) Measures adopted for older persons

139. Until recently,[1] the most common measure adopted seemed to be that of providing wage subsidies to enterprises with a view to promoting the hiring of older workers. Today, the application of such measures is hindered by economic difficulties, coupled with rising unemployment and underemployment.

(c) Measures adopted for disabled persons

140. Within the context of Article 5, paragraph 2, of the Convention and Article 4 of Convention No. 159, protective measures taken by the State are intended to offer to disabled persons greater access to employment and promote their social integration. There has been a steady increase in both the number of countries that have adopted specific legislation concerning the employment of disabled persons and the number of ratifications of Convention No. 159. The most widespread measure for special protection on behalf of disabled workers requires employers to hire a certain percentage of disabled workers. This percentage normally varies according to the size of the enterprise. Other specific measures may be adopted to promote their integration into the workforce, for example special training programmes or specially adapted working conditions.

(d) Measures adopted for ethnic minorities and other social groups

141. Designed, inter alia, to guarantee to indigenous and tribal peoples and to ethnic minorities especially favourable treatment as regards access to educational facilities and employment in the public or private sector, the protective measures adopted on behalf of these social groups may assume a variety of forms. These measures usually take the form of quotas which guarantee rights on a proportional basis. In some cases, special education, training and employment programmes are also provided, without fixed quotas, in order to enhance generally these minorities' prospects of entering and remaining in the labour market.

---

[1] See General Survey of 1988, paras. 151 and 152.

TITLE II

Examination of special reports

Examination of special reports

1. State of reporting

142. The Committee notes that, of the 52 member States asked to supply reports on the Convention under the special procedure established by the Governing Body, the following 25 countries have done so: Bahamas, Bahrain, Belize, Botswana, China, El Salvador, Estonia, Ireland, Japan, Kenya, Republic of Korea, Luxembourg, Malaysia, Mauritius, Myanmar, Namibia, South Africa, Suriname, United Republic of Tanzania, Thailand, Uganda, United Arab Emirates, United Kingdom, United States and Zaire. The following 11 United Kingdom non-metropolitan territories have also presented reports: Anguilla, Bermuda, British Virgin Islands, Falkland Islands (Malvinas), Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Montserrat and St. Helena.

143. The Committee points out that some countries that have supplied information on those ILO fundamental human rights Conventions that they have not yet ratified have, in response to the ILO Director-General's request (see paragraph 16 above), included in their reports the information required under article 19 concerning Convention No. 111. These countries are the Lao People's Democratic Republic, Sri Lanka, Uzbekistan and Viet Nam.

144. Since the request for reports was made, one State, El Salvador, has ratified the Convention; two States joined the Organization — Gambia and St. Vincent and the Grenadines — after reports were requested.

145. The Committee notes with regret that, at the time of its present examination, information has not been received from the following 23 countries: Albania, Cambodia, Comoros, Congo, Djibouti, Eritrea, Fiji, Georgia, Grenada, Equatorial Guinea, Indonesia, Kazakhstan, Lesotho, Republic of Moldova, Nigeria, Oman, Papua New Guinea, Seychelles, Singapore, Solomon Islands, the former Yugoslav Republic of Macedonia, Turkmenistan and Zimbabwe. It hopes that these countries will supply the necessary information, thereby enabling the Governing Body to complete its examination of member States' prospects for ratifying this fundamental Convention, as well as to identify possible obstacles to ratification.

2. Ratifications under way or envisaged

146. Of the 24 countries whose special reports have been examined by the Committee, seven have stated that they are envisaging ratification of the Convention fairly soon.

(a) The Government of *South Africa* indicates that the issue has been submitted for consultation to the tripartite National Economic Development and Labour Council (NEDLAC) and that it will be put to Parliament in 1996.

(b) The Government of *Botswana* considers that the national legislation applies the principles of the Convention and anticipates having discussion on the ratification of certain Conventions, including Convention No. 111; these discussions will be held as soon as the Botswana Federation of Trade Unions has presented its proposals on this matter.

(c) The Government of the *Republic of Korea* states that the time-frame of the basic plan for the welfare of working women makes provision for the Convention to be ratified in 1996. In its report, it mentions the legislative texts embodying the principles of non-discrimination which give effect to the Convention. It also lists the national policy measures designed to promote equality of opportunity and treatment in employment between men and women, on the one hand, and, on the other hand, between workers irrespective of their place of birth and place of education.

(d) The Government of *Ireland* reports that ratification is under consideration; new legislation is in preparation and, when it is enacted in 1996, should allow the Convention to be ratified.

(e) The Government of *Luxembourg* explains that a study of the feasibility and advisability of ratifying certain international instruments, including this Convention, concludes that, as national legislation and practice stand at present, there is no major argument opposing ratification of this particular Convention. The Government states that it is planning to initiate the parliamentary approval procedure during the first half of 1996.

(f) The Government of *Uzbekistan* expresses its intention to consider the ratification of the Convention in cooperation with the Federation of Trade Unions before submitting the matter to the Supreme Council of the Republic for examination.

(g) The Government of *Zaire* considers that there is no particular obstacle to ratification and therefore plans to ratify the Convention soon.

147. Another approach is taken by the Government of the *United States*, which explains that it is examining ratification prospects but that the process requires some considerable time in view of the country's federal structure. A preliminary study of the Convention was conducted in 1986, followed by a more thorough examination by a tripartite federal advisory committee chaired by the Secretary of Labor. The Tripartite Advisory Panel on International Labor Standards ("TAPILS") hopes that it will be in a position to complete its survey of national law and practice with a view to determining whether these are consistent with the Convention, so that it can present its findings to the President's Committee on the ILO early in 1996; on the basis of the TAPILS reports and conclusions, the President's Committee will decide whether it is appropriate to recommend that the President of the United States forward the Convention to the Senate for its advice and consent to ratification. The

Government points out that the study conducted by TAPILS has determined, in particular on the basis of the opinions given by the Office, that several aspects of relevant national law and practice originally thought to be problematic do not present insurmountable obstacles to ratification.

148. Two Governments have stated that ratification of the Convention does not present any major difficulties, even if it is not their declared intention to ratify.

(a) The Government of the *Bahamas* explains that no national equality policy has been enunciated but that the principles contained in the Convention are recognized and applied by legislation; it comments that no study has been carried out in relation to the Convention but that it could apparently be ratified without difficulty.

(b) The Government of the *United Republic of Tanzania* indicates that anti-discrimination legislation guarantees the application of the Convention's principles and that, in certain fields such as vocational training, the promotion of equality of opportunity and treatment has been safeguarded despite the absence of a national policy on equality. The Government states that the Convention's ratification is not of immediate urgency for the time being. (In its 1984 and 1992 reports, the Government had commented that ratification was being envisaged.)

149. In their reports on fundamental Conventions, the Governments of the *Lao People's Democratic Republic* and *Viet Nam* indicate that they are planning to ratify the Convention in the near future.

3. Difficulties delaying or impeding ratification

150. Six countries report that ratification may be possible once certain amendments have been made to legislation, or various difficulties or obstacles have been overcome.

(a) The Government of *Belize* considers that if ratification of the Convention were envisaged, the national legislation would have to be revised in order to examine the extent to which it was discriminatory. In addition, the financial difficulties are such that there are inadequate human resources to ensure respect for the labour legislation, so that for the moment ratification is being discouraged.

(b) The Government of *Estonia* emphasizes that in 1994 the Minister of Social Affairs called upon certain authorities to examine the possibility of ratifying the Convention. It goes on to explain, however, that certain questions require clarification, particularly the fact that beneficiaries of state pensions are not entitled to labour market services or to be registered as unemployed, and that this constitutes a form of discrimination against them. It states that plans exist to amend the Act on Social Protection of the Unemployed. The Government adds that as preparations for ratification are already being made, it will be possible to present definite ratification proposals once this issue has been resolved.

(c) The Government of *Kenya* indicates, as it did in its previous report, that although it would be inclined to ratify the Convention, such a step is not possible as long as certain contradictions remain in legislative texts, for example the provision in the Employment Act that women employees who have taken two months' maternity leave shall forfeit their right to annual leave during that year.

(d) The Government of *Namibia* explains that laws in force contain provisions designed to prevent discrimination, in particular on the basis of race. It points out that it is declared national policy to ensure equality of opportunity and treatment in vocational training and access to employment. Nevertheless, it adds that all legislation in force is at present under review, and only once that process is completed will it be possible to envisage the Convention's ratification.

(e) The Government of *Uganda* expresses its commitment to the Convention's principles, inter alia, in the form of national legislation. It refers to various political problems experienced by the country since the early 1970s and states that, although a period of economic recovery and reconstruction has now begun, financial constraints render the process difficult. In these circumstances, it is impossible to foresee when ratification of the Convention will become feasible; the Government will, however, be in a position to review the situation once the present period of transformation is over. It adds that a legislative revision exercise is now taking place.

(f) In its report on fundamental Conventions, the Government of *Sri Lanka* indicates that discrimination in employment exists in the private sector (with regard to recruitment, promotion, transfers, disciplinary matters, etc.) in the absence of the kind of code of practice that is applicable to the public sector. In view of the fact that the Workers' Charter is to be put to Parliament, it believes that this gap will be filled and that an examination of the Convention with a view to its ratification will become possible.

151. Three countries state that there are obstacles which impede the ratification of the Convention.

(a) The Government of *China* states that the conditions for an eventual ratification are not met due to the fact that the national legislation concerning equality of opportunity and treatment in employment and occupation is not in full conformity with the provisions of the Convention.

(b) The Government of the *United Arab Emirates* makes reference to internal administrative procedures, periodic reporting obligations and the ongoing monitoring conducted by the ILO supervisory bodies, and declares that these difficulties stand in the path of ratification.

(c) The Government of the *United Kingdom* believes that ratification of an instrument is only to be envisaged when there is certainty that the text will be scrupulously observed; the Government states that it will proceed with ratification only when it is confident that United Kingdom law, custom and national practice are fully compatible with the Convention's requirements. The areas of difficulty preventing the Convention's ratification are reviewed regularly, most recently in 1993-94. The Government has identified two major obstacles to ratification; first, the absence of legislation outlawing discrimination specifically on the grounds of political opinion, social origin or (except in Northern Ireland) religion; second, the fact that employment in certain posts under the Crown can be denied to British nationals who were born outside the United Kingdom and to those born of parents who were born outside the country. According to the Government, this could be regarded as discrimination on grounds of national extraction. Nevertheless, it reports that it has no plans to adopt new legislation in a field which is not seen as presenting any difficulties and believes that "its commitment to the elimination of unfair discrimination between one worker and another in the field of employment is already clearly demonstrated by existing legislation". It adds, however, that the special rules governing national extraction applied to certain Civil Service posts are under review. Moreover, the report speaks of new legislative texts adopted in 1993 and 1994, designed to enhance both enforcement of the principles of non-discrimination in employment and various kinds of institutional and practical activities aimed at promoting equality of opportunity and treatment, especially between men and women. The Government emphasizes that anti-discrimination legislation and activities to promote equality address principally the criteria of race and sex.

152. The United Kingdom's non-metropolitan territories *(Anguilla, Bermuda, British Virgin Islands, Falkland Islands (Malvinas), Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Montserrat,* and *St. Helena)* indicate, as in previous reports, that they cannot be bound by the Convention for as long as it has not been ratified by the United Kingdom. Certain territories (Anguilla, British Virgin Islands, Falkland Islands (Malvinas), Hong Kong, Isle of Man, Montserrat and St. Helena) consider that the Convention's requirements are met on their soil, inter alia, by means of legislation. Jersey recalls that in 1991 a Special Committee was set up to investigate the situation regarding equality between the sexes and to submit recommendations to the authorities. Since that time, a number of activities have been conducted in this field, in particular by the Industrial Relations Committee, with a view to fostering equality of opportunity. The Government of the States of Jersey adds that a study is now being carried out to consider non-discriminatory policy objectives for the next five years; this may lead to a review of the Government's position on the Convention.

4. Other situations

153. Six countries state that ratification is not envisaged at present.

(a) The Government of *Bahrain* reports that there is no necessity to ratify the Convention as the Private Sector Labour Act[1] contains provisions regarding equality based on the principles enshrined in the Convention. It mentions, in particular, the texts designed to guarantee the application of these principles in respect of vocational training.

(b) Without committing itself to ratification of the Convention, the Government of *Japan* states that its compatibility with national legislation will have to be discussed. It therefore intends to conduct ongoing studies. It cites several provisions giving effect to the principles embodied in the Convention and states that it wishes to promote equality of opportunity and treatment between men and women in employment. It recognizes the tendency of some private sector employers to discriminate against workers on the basis of their social origin and states that appropriate steps are being taken.

(c) The Government of *Malaysia* reports that national legislation gives protection from discrimination in employment and occupation and that there is generally no discrimination in practice, save in certain exceptional circumstances such as jobs requiring specific qualifications, especially language skills. The Government states that discrimination arises in such cases "due to the specific demands and needs of the employers". The Government also notes that it has found it necessary to intervene in the employment market to correct imbalances in employment levels which have failed to reflect the racial composition of the country. It states that this is contrary to the spirit of the Convention, which calls for complete freedom.

(d) The Government of *Mauritius* explains that it is not insensitive to the advantages of adhering to the Convention, but still wishes to examine its scope more thoroughly, in particular with a view to removing possible internal obstacles preventing ratification. It stresses however that, whilst pursuing a policy of promoting equality of opportunity in employment so as to ensure that no person is the object of discrimination, the Government recognizes that it is not in a position to monitor either the observance of this policy or respect for the guidelines it sets. It adds that a Sex Discrimination Committee has been set up in order to ensure compliance with the provisions of the United Nations Convention on the Elimination of All Forms of Discrimination against Women.

(e) The Government of *Suriname* reports that the ratification of the Convention is not being envisaged in view of the fact that such action combined with the implementation of enabling legislation would not be enough to guarantee equality for all workers. It emphasizes that to a large extent the Convention's principles are applied in the country, in particular by means of legislation. While it stresses that information on the situation of women is insufficient, it recognizes that women, youth and alien workers are employed in the lower-paid jobs. In this regard, it mentions the existence of a Bureau for Women Entrepreneurs, and that for 1991 to 1996 a policy was adopted to improve the employment situation for women. Other difficulties are highlighted, such as the absence of minimum wage-fixing machinery, the absence of job classification systems (except in large enterprises and the civil service), discrepancies in the various economic sectors, the importance of the micro-enterprise sector, and the lack of information on women workers in rural areas.

---

[1] Legislative Decree No. 23, 1976, amended by Legislative Decree No. 14, 1993.

(f) The Government of *Thailand* states that it is not considering ratifying the Convention, the major obstacle being the traditional barriers which exist in the domestic community. It speaks of the attitude of "men obsessed with the male-dominated tradition and incapable of facing the fact that the world is changing and that women are legitimately supposed to share a more active role in earning a livelihood". The Government believes that there are signs of change, resulting, inter alia, from the need for large families to earn two incomes. It stresses that the most compelling factor driving this development is of an economic order. Moreover, the Government recognizes that the only legislation in this field relates to discrimination on the basis of sex, but that it is appropriate to focus on promoting equality between men and women, given that Thai society is ethnically homogeneous.

154. One Government has submitted a report which contains no reply to the questionnaire: the Government of *Myanmar* indicates that it has no particular comments on the Convention or its possible ratification.

5. The Committee's comments

155. The Committee recalls that the wording of the Convention is sufficiently flexible and general to cover situations which vary greatly from one country to another. It aims to eliminate discrimination in employment and occupation, on grounds of race, colour, sex, religion, political opinion, social origin or national extraction. The Convention requires countries that have ratified it to declare and pursue a national policy to eliminate discrimination by methods appropriate to national conditions and practice, to repeal any statutory provisions and modify administrative instructions which are inconsistent with the policy and to adopt positive measures which contribute to promoting equality of opportunity and treatment generally.

156. As regards certain difficulties mentioned above, the Committee points out that the Convention does not cover distinctions which are made on the basis of nationality between the citizens of the country concerned and persons with a different citizenship; instead, the criterion of "national origin" addresses distinctions made between citizens based on their place of birth or their foreign extraction or origin. The Committee recalls, moreover, that under Article 5, paragraph 2, of the Convention, "any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination". Such measures may include provisions adopted for ethnic groups which have been subjected to discrimination in the past. In this connection, the Committee refers to paragraphs 146, 147 and 156 of its General Survey of 1988 on equality in employment and occupation.

157. With regard to countries which have stated that they cannot ratify the Convention until it is fully applied, the Committee recalls that this instrument is partially of a promotional nature. It requires two concrete measures immediately on ratification: the *establishment of a national policy* in the terms laid down in Article 2; and the *repeal of any legislation or regulation inconsistent with the policy* (Article 3(c)). Other measures required by the Convention are of a gradual or progressive nature, depending on the country concerned, such as the enactment of legislation to secure the observance of the policy. Thus the temporary existence of attitudes and practices inconsistent with the Convention, or the lack of fully consistent legislation, may sometimes be reasons in favour of ratification and not an obstacle to entering into international obligations aimed at eliminating such practices.

158. Consequently, the Committee hopes that the countries which envisage or are considering the possibility of ratification will be able to ratify the Convention in the near future and that countries still encountering certain difficulties will overcome them rapidly or re-examine them in the light of the above considerations.

* * *

159. Since the introduction in 1980 of the procedure for the submission of four-yearly special reports by States that have not ratified the Convention, 26 ratifications have been registered. When the Governing Body initiated the procedure, it also invited the Director-General to take measures to encourage ratification of Convention No. 111, particularly through direct contacts. Such contacts can help governments in their examination of the question of ratification and can assist them in taking measures to overcome difficulties encountered, as has been the case in the past. The Committee calls on member States whose national law or practice create obstacles to ratification to make use of this assistance offered by the Office.

160. The Committee also recalls that in 1973 the Governing Body instituted a procedure for "special surveys" on situations relating to the elimination of discrimination in employment with a view to assessing the facts and seeking solutions in certain situations of discrimination based on the grounds set forth in Convention No. 111. The Committee notes also that the Governing Body held a preliminary discussion at its 264th Session (November 1995) of the possibility of adopting a new procedure to consider complaints on, inter alia, questions of discrimination. The Committee recalls its comments on the Director-General's proposals in this regard, which it expressed in its General Report in 1994.[2] The Committee therefore again expresses the hope that governments, as well as organizations of employers and of workers, will make use of all the tools offered by the ILO's diverse procedures to combat the problem of discrimination covered by Convention No. 111.

---

[2] See *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), 1994, para. 41.

TITLE III

Analysis of developments in the application of the principles of the Convention

CHAPTER 1

The most common grounds of discrimination

A. Race, colour and national extraction

161. These three grounds, which are separate in the Convention, are dealt with in a very similar fashion in national legislative systems. Race is still one of the grounds referred to most frequently in national texts, particularly in order to prohibit discrimination against ethnic or national minorities. Any law or regulation intended to exclude from certain jobs or occupations, or from certain sectors of activity, persons of a specific race or ethnic group, is inherently discriminatory. One new development in this area relates to regulations in respect of incitement to racial hatred.

162. The classic example of racial discrimination in recent history was the apartheid regime, which has since been eradicated, instituted in South Africa. On the basis of a racial classification system introduced by the Population Registration Act of 1950, which was the cornerstone of the policy of apartheid, a number of acts organized the world of work in a discriminatory fashion. The abolition of the race laws and the political transformations accompanying the transition towards democracy have enabled South Africa to take its place in the international community, and in the ILO in particular.

163. Most countries have included the grounds of race and/or colour in their legislation relating to discrimination.[1] Those that have not yet done so often take the opportunity of a legislative reform or the adoption of a new Constitution to add a provision of this sort. For example, the Act of 30 May 1991 of the *Republic of Belarus* on employment guarantees to all able-bodied citizens equal opportunities in the exercise of their right to work and free choice of employment irrespective of race, inter alia; in *Togo*, the new Constitution adopted on 27 September 1992 has specifically added "race" to the grounds of discrimination prohibited in employment and occupation (following a request by the Committee).

164. In its broadest definition the ground of race includes any discrimination against linguistic communities or minority groups whose identity is based on cultural or religious characteristics, or even on national or ethnic origin. In *Sweden* the new Act against ethnic discrimination, which entered into force on 1 July 1994, takes up this definition and prohibits discrimination against job applicants and workers on the basis of race, colour, national or ethnic origin or religious beliefs. In *Canada* the Employment Equity Act, 1993, of Ontario contains provisions to further equality in employment for aboriginal people and members of racial minorities. In *Romania* a Bill on national minorities, designed to respect and protect these minorities, was submitted to Parliament at the beginning of 1994; once adopted this text should guarantee the application of the principles of equality, as well as basic rights and freedoms, to citizens belonging to these minorities, for example, the right to use their mother tongue and to learn and receive instruction in that language; however, the new Act on education is not particularly favourable in this connection. In *Iraq*, the Government states that as regards national minorities such as the Turkoman and Kurdish minorities, no distinction is made on the basis of social origin or ethnic group, at least in the legislation, and Act No. 33 on the self-administration of Kurdish regions establishes a number of rights for these minority populations which guarantee them equality of opportunity with other citizens. In *New Zealand* the Human Rights Act of 1994 prohibits racial harassment and action inciting racial disharmony, as well as discrimination on the basis of race, colour and ethnic or national origins, which includes nationality or citizenship.

---

[1] General Survey of 1988, para. 33.

165. There appears to be a considerable amount of legislation prohibiting all discrimination on the basis of race and associated factors. Within the meaning of the Convention, anti-discrimination provisions alone, whether in Constitutions or other legislation, are not enough to implement effectively the principles of equality of opportunity and treatment. There must also be a genuine policy to promote equality of opportunity and treatment in employment, as indicated below.

166. Various institutions have been set up to this end. In *Romania*, since 1993 there has been a Council for National Minorities which includes representatives of various organizations of minorities, in particular of the Roma. In *Sweden* the new Act against ethnic discrimination provides for the appointment of a Discrimination Ombudsman whose task is to prevent ethnic discrimination; the Ombudsman must advise and help victims of discrimination and keep in contact with workers' and employers' organizations. A Commission against ethnic discrimination with quasi-jurisdictional powers is also to be set up. In *New Zealand* sections 11 and 20 of the new Human Rights Act, mentioned above, provide for the retention of a Race Relations Conciliator, who as a member of the complaints section of the Human Rights Commission, deals with all complaints or inquiries into acts of discrimination on the grounds of race, colour or ethnic origin; the Conciliator also serves in an educational capacity. In *Belgium* a centre to promote equality of opportunity and to combat racism has been set up to receive and examine individual complaints. In *Spain* a programme aimed at eliminating racism and xenophobia through sensitization campaigns has been put into place, in particular to ensure that workers of colour and those of Muslim origin who have acquired Spanish nationality are protected against discrimination, in particular in the Catalan region of Maresme and in Ceuta and Melilla.

167. These institutions can also be set up by the social partners. In *Brazil* workers' organizations play an important role in monitoring compliance with anti-discrimination laws. In particular, the Unique Workers' Central (CUT) set up a National Commission to Combat Racial Discrimination (Comissão Nacional Contra a Discriminação Racial) in order to eliminate discrimination, particularly at the workplace, on the basis of colour, race or national extraction.

168. There is currently a legislative trend to make discriminatory practices based on race a punishable offence. In *Australia* the Royal Commission into Aboriginal Deaths in Custody, set up in 1991, and the Australian Law Reform Commission in its report entitled "Multiculturalism and the Law", identified the existence of racial vilification. A public consultation process was instituted concerning proposed legislation and an extensive media campaign was launched in order to prepare the Racial Hatred Bill, due to be adopted at the end of 1995. In the meantime, many States have adopted laws which make provision for access to civil courts for any victim of racial vilification and which stipulate that serious vilification is a criminal offence. Action exciting racial disharmony can be considered a criminal offence and is just as illegal as possessing or publishing material serving to incite racial hatred or harass a racial group. In *Switzerland* a new provision of the Penal Code[2] provides that acts which incite racial discord and racist remarks are punishable offences. In *Belgium*, under the new Act against Racism of 12 April 1994 anyone who makes known his or her intention to commit an act of discrimination, hatred or violence in respect of another person on the grounds of his or her race, colour, extraction, origin or nationality is punishable by imprisonment ranging from one month to one year and/or a fine. The same penalties apply when discrimination is practised against a group, a community or members thereof; this also applies to anyone who in connection with job placement, vocational training, job advertisements, recruitment, performance of a contract of employment or the dismissal of workers, discriminates against a person on the grounds of his or her race, colour, extraction, origin or nationality (section 2bis of the new Act). In *New Zealand* section 131 of the new Human Rights Act takes the same approach; it provides that any person who publishes or disseminates material which is threatening, abusive or insulting, or who publicly addresses hostile remarks to a group of persons or ridicules them on the grounds of their colour, race or ethnic origin, can be sentenced to three months' imprisonment or a fine. Provisions to make acts of racism and incitement to racial hatred punishable offences under criminal law, and specific measures to prevent such actions, reflect a positive approach to the elimination of discrimination based on race, colour and national extraction.

---

[2] s. 261bis.

B. Sex

169. Despite efforts made to promote equality between men and women, discrimination based on sex, especially that directed against women, is still practised in all countries.

170. Women workers face a wide variety of discriminatory practices. In the countries that are least advanced as regards the promotion of women in employment, and the status of women in particular, women are discriminated against on the basis of current or possible future pregnancy. However, measures have recently been taken in some countries to remedy this situation. In the *Philippines*, the Women in Development and Nation-Building Act[1] requires every governmental department and agency to review and revise all of their regulations, circulars and procedures with the aim of removing gender bias. In *Brazil* new legislation was adopted in 1995, following the Committee's comments and discussions in the Conference Committee, prohibiting discriminatory practices against women workers. The International Labour Office, the Government and the social partners are together studying ways to ensure its effective application.

171. In some situations the tradition of protecting women workers during pregnancy is now considered as being discriminatory because it can prove to be an obstacle to equality of opportunity; changes in national legislation now tend to limit this protection in order not to prejudice equality of opportunity and sometimes even disregard the worker's pregnancy altogether, except for jobs involving a hazard to the health of the foetus and the future mother. In *Colombia*, Ministry of Labour and Social Security Resolution No. 3716 of 3 November 1994 restricts the requirement of a pregnancy test for obtaining employment in both the private and public sectors to employment or occupations where pregnancies might be at risk and only for employment listed as "high risk" in Decrees Nos. 1281 and 1835 of 1994. In *Belgium*, a Bill drawn up in June 1994 on maternity protection provides that this protection must be based on an evaluation of the risks within the enterprise, in which the works physician should participate, to determine a number of preventive measures to be adopted by the employer to be applicable to all working women, as well as certain individual measures dictated by the particular conditions of a given job. In addition, women workers should be informed in advance of the risks to which they will be exposed and of the precautions that may be taken at work in the event of pregnancy. In *Canada*, the Quebec Human Rights Commission has adopted guidelines on discrimination on grounds of pregnancy and social condition. (The Government indicates in its report that the guidelines make a distinction, depending on whether the discrimination practised due to pregnancy is of a direct nature — for example, the employer bears the burden of proving that the exclusion of a pregnant woman from a job is justified by factors relating to safety and health arising from a particularly hazardous working environment

---

[1] Republic Act No. 7192 of 1992.

— or indirect, such as failure to renew the woman worker's contract once her pregnant state is known; in addition, the guidelines pay particular attention to the complex problem of discrimination relating to fixed-term contracts.) In the *Dominican Republic*, Fundamental Principle VII of the Labour Code adopted on 29 May 1992 by Act No. 16-92 repeals the provisions and amendments of the 1951 Labour Code, which required women (but not men) wishing to take up employment to provide a medical certificate attesting physical fitness for work. In *Australia*, the Sex Discrimination and other Legislation Amendment Act, 1992, deals with discrimination based on pregnancy; discrimination based on the possibility of a future pregnancy is dealt with only indirectly. According to the Government, the aim of this Act is to make employers and workers aware of the fact that pregnancy, either current or future, can be a ground of discrimination in employment. In addition, there are provisions contained in the Federal Industrial Relations Act, 1988, which require the Industrial Relations Commission to remove discriminatory provisions (including on the basis of sex and pregnancy) contained in any awards or agreements.

172. The specific way in which they protect the child-bearing function of women workers in jobs defined as hazardous, whilst protecting pregnant women against discriminatory practices, reflects the different approach adopted in the above-mentioned Colombian legislation and Belgian Bill in comparison to section 82 of the Act respecting the public service of *Qatar*, under which it is possible "to terminate the employment contract of pregnant nurses at the fifth month of pregnancy and even before the date of expiry of the contract if the interests of work so require". The subject of discrimination against nurses is dealt with in a Bill being examined by the Legislative Committee of the Ministry of Justice.

173. Discrimination linked to religion is perhaps the most sensitive aspect of that practised against women. It appears that in countries where the Islamic religious law, the Shari'a, predominates, some governments consider that any measure intended to separate men and women at the workplace, or to promote the vocational guidance of young women towards traditional or typically female sectors, is not discriminatory but respects the secular organization of society and Islamic traditions, which vary from one Muslim country to another. The Government of *Saudi Arabia* considers that section 160 of the Labour Code, under which "in no case may men and women co-mingle in the place of employment or in the accessory facilities or other appurtenances thereto" cannot be repealed, as the Committee has requested because this legislation is based on the traditions of Islam. The Government has stated that the law does not impose rules of conduct, but merely codifies rules that exist in all areas of life in the country. In *Egypt*, article 11 of the Constitution of 1971, as amended in 1980, provides that women shall have the means to reconcile their duties towards the family with their work in the society "without violation of the rules of Islamic jurisprudence". A programme to encourage women to stay at home and to establish secondary schools "to train women in household work, home-based production and small-scale projects" began in 1992, though the Government has indicated more recently that it in fact encourages women to enter the labour market. In *Qatar*, the prohibition of mixed education and the fact that some schools and training institutions are reserved for male students because of religious traditions results in the absence of women from many sectors and occupations; by extension these practices can also lead to discrimination on the ground of sex. The Committee considers that this kind of measure, whether it be a prohibition of co-mingling at work or the limited training of women, may result in occupational segregation according to sex if it limits women in fact to professions which are deemed to be suitable for their nature, or if it limits their access to certain professions.

174. The Committee considers that when discrimination on the basis of sex occurs, the governments concerned should take measures, in the context of the national policy for the promotion of equality as stipulated in Article 2 of the Convention, to ensure for working women adequate protection against any discriminatory practices that could arise as a result of a more general policy to protect their role in society and in the family.

> Despite the almost total lack of international statistics concerning the situation of disabled women, it can be reasonably assumed that they account for at least one-third of the total population of disabled individuals in the world today. The WHO is of the opinion that the proportion of disabled women reflects the proportion of women in the world population, namely half of it, whilst many national statistics indicate that there are fewer disabled women than men. Whatever the proportion of disabled women may be, the fact remains that social scientists have pointed out the double discrimination from which disabled women suffer: once because of their sex, and once because of their disabled status. This discrimination is severe and quite pervasive in that it affects all areas of life: education, employment, economic status, marriage and family, health care and rehabilitation. As to employment itself, women in general face many difficulties, not the least of which is the narrow range of occupations which are open to most of them. As long as the potential for a return to gainful employment is a criterion crucial to the provision of rehabilitation assistance, then most disabled women will be left out.
>
> Note: *Vocational rehabilitation*, Report VI(1), International Labour Conference, 68th Session, 1982, pp. 10-11.

175. Many countries have adopted provisions to protect working women against discrimination in employment. This type of provision, whether constitutional or legislative, evolves with current needs. The trend nowadays is mainly to legislate in the areas listed below.

176. Legislation is used to eliminate the prohibition and restrictions affecting the employment of women in various jobs and sectors, in order to ensure equality of opportunity and treatment in access to employment and to abolish discriminatory distinctions between "typically male" and "typically female" jobs. For example, in *Germany*, the Act of 13 July 1993 on uniformization and flexibilization of the legislation on working time replaced with new regulations the restriction on the employment of women in the building industry and in the car industry. In *Ecuador*, section 66(6) of the Commercial

Code, which restricted the admission of women to the Stock Exchange, is no longer applied; the Committee therefore requested in February-March 1995 that the legislation be brought into line with the Convention on this question.

177. In the quest for effective equality of opportunity and treatment in access to employment, vertical occupational segregation must be taken into consideration. In *Kuwait*, for example, statistics concerning the number of government employees in administrative ministries and departments show that only eight women as opposed to 182 men hold senior posts in the "Executive Occupation Group", whilst almost equal numbers of men and women hold posts in the "General Occupation Group". In the judiciary, the situation is even more revealing: women employees only work as legal assistants or hold managerial posts of "lesser importance". In many other countries the "glass ceiling" phenomenon (an invisible barrier) prevents women from reaching positions of responsibility. In the Scandinavian countries as well, despite considerable efforts made to promote women, the proportion of women in managerial and supervisory positions is still noticeably lower than that of men.

178. Discrimination based on marital status and more precisely on the application of parental leave is increasingly being focused upon by national legislators, so that, as emphasized in the introduction to this survey (paragraph 11), provisions to protect women in employment are considered as possible sources of discrimination and are being replaced by action which is geared more towards the promotion of equality of treatment. In *Switzerland*, section 3 of the new Federal Act respecting equality between men and women (which will come into force in 1996) expressly prohibits all direct or indirect discrimination on the basis of civil status, family circumstances or pregnancy. In *Guyana*, the Equal Rights Act (Act No. 19 of 1990) makes illegal all forms of discrimination against women *or* men on the basis, in particular, of marital status. The amendments to the Civil Code of *Malta* by Act No. XXI of 1993, which introduced equal legal rights between married women and their husbands, have brought about an improvement in the status of women in banking, commerce and social security. In *New Zealand*, the new Human Rights Act mentioned above expressly prohibits discrimination on the grounds of marital and family status. With regard to parental leave, the Parental Leave and Employment Act 1987 requires (in section 41) employers to keep open the jobs of employees who have taken up to 52 weeks of unpaid leave to care for young children, except when the position is considered to be a key position that cannot be filled by a temporary employee. However, no employer has yet argued successfully before the Employment Tribunal that an employee's position is a "key" one that cannot be kept open for the duration of the parental leave; in fact, a 1993 decision of the Employment Tribunal found that parental leave could not be declined on the key position basis. The issue has been regulated in ways other than by legislation: in *Greece* under the National Labour Collective Agreement of 1993, the right to take parental leave until the child has reached the age of three years can be granted to either parent, on certain conditions; the possibility of reducing daily hours of work (counting as working time) to care for a child during the two years following its birth is offered to either the working mother or father.

179. The elimination of sexual abuse in work relations should be an integral part of a legislative or other policy, independently of policies on discrimination on the basis of sex. In *France* Act No. 92-1179 of 2 November 1992 concerning abuse of authority and sexual harassment in work relations prohibits all discrimination at the time of recruitment and in the execution or termination of the employment contract against employees who have been subjected to or witnessed sexual harassment; the harassment may have been carried out by an employer, his or her representative, or anyone who has abused the authority inherent in his or her position. In *Italy* a number of collective agreements have included special clauses establishing joint committees to promote equality of opportunity and treatment and prohibiting sexual harassment. Bill No. 193/759-A, currently under discussion in Parliament, entitled "Standards for the protection of human freedom and dignity against sexual harassment at work" defines sexual harassment in very broad terms, and specifies that sexual harassment accompanied by threats or blackmail, either implicit or explicit, made by the employer or a superior will be considered with particular severity. The accent is placed on the victim's point of view and on his or her protection; all workers are protected, whether full time, part time, on probation or undergoing training. Furthermore, joint advisers, appointed in accordance with Act No. 125 of 1991, are empowered to assist and advise victims of sexual harassment in full confidentiality. In the event of sexual harassment the worker has the right immediately to terminate his or her contract of employment with just cause, and is entitled to a fixed amount of compensation equivalent to 12 months' pay, in addition to the termination payments; the victim may also lodge a complaint with the competent court. In *New Zealand* sexual harassment cases are to be brought under the personal grievance procedure of the Employment Contracts Act, 1991. In *Austria* amendments to include in the Equality of Treatment Act sexual harassment as a form of discrimination are currently being debated by the Parliament. In *Sweden* the new Act respecting equality between men and women which came into force on 1 January 1992 also contains a section prohibiting sexual harassment which clearly refers to conduct of a sexual nature, including that by colleagues who have the right to take decisions on the victim's conditions of work.

180. Mention should be made here of the Recommendation of the Commission of the European Union, adopted on 27 November 1991, in accordance with which any conduct which may be considered to be sexual harassment and which is found offensive by the recipient is a violation of the rights and dignity of the human being.

181. With regard to distinctions based on sex in access to social security, these are usually of a discriminatory nature and are therefore unlawful. *Guyana's* Equal Rights Act 1990, mentioned above, abolished the exclusion of female public officers from the Public Officers (Insurance) Act. In addition, the Public Officers' Widows Act has been amended by introducing gender-neutral terminology so as to entitle both male and female spouses of deceased public officers or pensioners to receive the financial benefits laid down in the Act.

182. Some governments recognize that recent labour market trends are affecting the employment of women more than that of men even if under national legislation sex is not a lawful ground for dismissal (see, for example, *Romania* in the Committee's 1994 Report, p. 386).

> The position of women in periods of major economic transition deserves special attention because they are often already more vulnerable, disproportionately concentrated in low-wage sectors or occupations and segregated into the informal sector; structural adjustment has often been the cause of a deterioration in their employment situation.
>
> Source: World Development Report 1995: "Workers in an integrating world", World Bank, pp. 43 and 107.

183. In order to apply effectively the principle of equality in access to employment and occupation without discrimination on the basis of sex, special measures should be taken to promote the re-entry of unemployed women workers into the labour force, in particular those who have considerable family responsibilities. See, for example, the recent decision handed down by the Industrial Court of Liège, *Belgium*, whereby an unemployed woman's refusal of a job offered to her on the grounds that her parental responsibilities constituted a serious impediment to the performance of the job, can be considered as justified and without bearing on the award of the benefits provided for under certain conditions by the Act respecting unemployment. In some economically less advantaged countries steps could be taken such as measures to reduce illiteracy, the attainment of universal primary education, the allocation of credits for scholarships intended especially for prizewinners in primary and secondary education, and the introduction of quotas in respect of posts reserved for women in public services and in education, in order to eliminate obstacles to the increased participation of women in working life. In *Norway*, a country where legislation is recognized as being progressive in combating discrimination against women, occupational segregation still persists despite a considerable increase in the number of women in the labour force and in the proportion of women taking up jobs in which men typically predominate. Two aspects of this segregation are that the posts primarily held by women are less well paid than those in which men predominate, and that women sometimes face more obstacles to their advancement (fewer occupational choices, for example).

184. Affirmative action adapted to national circumstances is often used to combat the discrimination facing women, particularly the setting up of institutional bodies solely responsible for studying the best policies to abolish direct and/or indirect discrimination against women in employment and occupation. For example, in *Germany* commissioners for women's affairs have recently been appointed in all the highest federal administrations; a Secretariat for the Equal Status of Women has been established in *Malta*; in *Italy* there is a National Committee for the Application of the Principles of Equality between

Men and Women Workers, which also has a Board of Inquiry; in *Belgium* there is a council for equality of opportunity between men and women; in *Finland* provision was made for an Equality Ombudsman in the Equality Act; in *Greece* the National Labour Collective Agreement of 1993 made provision for an equality commission and for a general secretariat for gender equality, whose objective is to overcome the weaker position of women with regard to vocational training and access to the labour market (in particular, by reducing women's unemployment by granting them priority in re-entry into the labour market, by combating predetermined occupational choices for young women, and by encouraging the equal participation of both spouses in family and social responsibilities).

185. National action plans can also be established for women and the family, which make provision for programmes to review labour legislation in order to identify and eliminate provisions which are directly or indirectly discriminatory, as well as affirmative action programmes to increase training and employment opportunities for women, as is the case, for example, in *Uruguay*. In *Belgium* enterprises with over 50 employees are required to draw up a report each year on equality of opportunity between men and women. In *France* provision has been made for contracts for "mixed jobs", intended to promote the diversification of jobs held by women and to give them easier access to areas in which they are underrepresented. One of the most common forms of affirmative action is the quota system; in *Austria*, for example, the aim is to increase the proportion of women workers to 50 per cent of the total workforce. *Italy* has adopted an interesting text in this area: the Act on affirmative action for women in entrepreneurial activity (No. 215), dated 25 February 1992, promotes the creation of enterprises staffed and managed predominantly by women in the agricultural, crafts, commercial and industrial sectors, and the development of cooperative societies and companies in which women make up the majority of partners or at least two-thirds of the directors, through the provision of incentives, credit and financing arrangements and the establishment of a Committee on Entrepreneurial Activity by Women in the Ministry of Industry.

C. Religion

186. Discrimination based on religion may more easily arise in countries where there is a state religion, together with a greater or lesser degree of intolerance towards other faiths. The Committee draws attention here to the fact that social and religious situations can vary from country to country without, however, coming into conflict with the Convention. Measures to eliminate discrimination and promote equality of opportunity and treatment in general, in accordance with the Convention and Recommendation, are not incompatible with a legal system based on religious law; conversely, the existence of a majority religion, whether or not it is formally declared the state religion, should not serve as a pretext to discriminate against adherents of other faiths.

187. In the *Sudan* the introduction of a new Constitution which would not refer to a state religion is under discussion. To date, however, freedom of belief and worship should be guaranteed in full to all Sudanese because, according to the Government's Concessional Position on the Issue of State and the Religion during the Interim Period, the southern provinces where the Muslims are not a majority should not be subject to any punishments based on Shari'a law.

188. Recent texts other than constitutional provisions also guarantee protection against all discrimination on the basis of religion. In *Burkina Faso* the new Labour Code (Act No. 11/92 of 22 December 1992) lists religion among the prohibited grounds of discrimination. In *New Zealand* the above-mentioned Human Rights Act, which came into force on 1 February 1994, includes in the list of prohibited grounds of discrimination not only religious belief but also ethical belief, that is, the lack of a religious belief. To guarantee religious freedom in the Constitution or in legislation is not enough in itself, particularly if provisions permit the imprisonment of members of specific religious groups on the grounds, inter alia, of the peaceful propagation of their faith; provisions of this nature have a direct impact on their employment opportunities. This is the case in *Pakistan* where the Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis Group Ordinance, 1984 (No. XX) makes provision for sentences of up to three years for these religious groups, despite the fact that article 20 of the Pakistani Constitution stipulates religious freedom.

189. In the *Islamic Republic of Iran* the circular issued by the Supreme Revolutionary Cultural Council on 25 February 1991 provides that, whilst persons who profess the Baha'i faith are permitted to earn a living and are entitled to work permits, they are to be denied employment, expelled from university and, in general, their progress and development is to be blocked. Moreover, these persons are only permitted to lead a modest life: they are allowed the normal means to life such as ration books, passports and work permits, but access to positions of influence are denied to them. It appears that the only religious minorities that are free in the eyes of the law are Jews, Iranian Christians and "Zoroastrians". The Committee requested that this circular be repealed. It has always considered that these practices targeting religious minorities are discriminatory.

190. As pointed out above in the section relating to sex, the Convention covers both national legislation and practice. In *Israel* the number of persons not of the Jewish religion occupying managerial posts and positions of trust is considerably lower, proportionally, than the number of Jewish persons, both in respect of scientific, academic and other professional, technical and similar workers, and in the category of clerical and similar workers; the Committee considers this to be a situation that could be contrary to the prohibition of any discrimination on the basis of religion in employment and occupation. In *Kuwait* the Government states that no members of religious minorities are employed in the judiciary; in this connection the Committee has recalled that any restriction within the context of Article 1, paragraph 2, of the Convention must be based on the inherent requirements of the particular job and on a reasonable and bona fide occupational qualification.

191. An important aspect of religious freedom and access to jobs on an equal footing can be seen in the media (the press, radio and television). The requirement in *Poland* that the media must "respect the public's religious sensitivities and, in particular, the system of Christian values" under penalty of fines and the possible non-renewal or withdrawal of their licence, contained in section 18, paragraph 2, of the new Act on radio and television, may operate in such a manner so as to discriminate against journalists whose beliefs are other than Christian because such journalists may not be so respectful of Christian values.

D. Political opinion

192. The prohibition of all discrimination in employment and occupation on the basis of political opinion is still relevant today, even though since the General Survey of 1988 many countries have abolished their systems based on a single political party controlling the entire state apparatus. This type of discrimination, which is sometimes linked to that based on religious opinion or social activities, can be found in all aspects of employment and occupation, and in all sectors of activity.[1]

193. From the wording used in new national texts to qualify the ground of political opinion in some countries, it is clear that there has been a shift in regulatory terminology and in the approach towards the expression of different political opinions. In *Angola* the constitutional provisions enshrining the equality of all citizens before the law have been partly amended by Act No. 23/92 of 16 September 1992, which uses the term "ideology" instead of the expression "political opinion" to incorporate this ground of discrimination into the Constitution. Article 19 of the Constitution adopted on 12 December 1992 by the *Russian Federation* guarantees equality of rights and liberties irrespective of "convictions" and "membership of public associations"; the Government states that these terms cover the concept of political opinion and afford the same scope of protection. When the terms "ideology", "convictions", "membership of public associations", or other such terms are mentioned in national legislation in respect of activities expressing or demonstrating political opinions that are in agreement with or in opposition to the established principles, the Committee considers that these concepts refer to the ground of political opinion within the meaning of the Convention. It recalls, furthermore, that the protection afforded by the Convention is not limited to activities expressing or demonstrating differences of opinion within the framework of established principles; if certain doctrines are aimed at fundamental changes in the State's institutions, this does not constitute a reason for considering their propagation beyond the protection of the Convention, provided that those who may advocate such doctrines do not resort to violent methods to bring about such changes.[5]

---

[1] See General Survey of 1988, in particular paras. 60 and 61.

194. With regard to *Egypt* the Committee considers that the legislation in force in this regard is contrary to the Convention. This legislation authorizes adhesion to any opinion, whether political or religious, but it punishes the call to deny religions, the call to adhere to what this Government considers as "certain aberrant opinions" which are contrary to the fundamental principles of society laid down in the national Constitution, or to exercise an activity which is prejudicial to the security of the State, and the call to use violent methods.[6] Also contrary to the Convention, owing to its discriminatory nature, is a provision on the protection of the home front and social peace which provides that "anyone who is convicted of maintaining principles contrary to, or conflicting with, the divine laws may not hold a senior post in the public administration or the public sector, or publish articles in newspapers or perform work in any organ of information or perform any other work that may influence public opinion". The general exclusion of certain jobs, if not based on the inherent requirements of a particular job, does not come within the scope of the exception allowed for in Article 1, paragraph 2, of the Convention, which must be interpreted strictly, so as not to result in undue limitation of the protection which the Convention is intended to provide.[7] In fact, although it may be admissible, in the case of certain higher posts which are directly concerned with implementing government policy, for the responsible authorities generally to bear in mind the political opinions of those concerned, the same is not true when conditions of a political nature are laid down for all kinds of public employment in general or for certain other professions: for example, when there is a provision that those concerned must make a formal declaration of loyalty and remain loyal to the political principles of the regime in power.[8] The Committee also recalls that the expression of opinions or beliefs, be they political, philosophical or religious, is not a sufficient basis for the application of or recourse to the exception provided in Article 4 of the Convention, justified by the fact that the activity in question could be prejudicial to the security of the State.[9] It is in fact in States where religion and politics are interdependent that protection against discrimination on the basis of political opinion has its greatest *raison d'être*.

195. Discrimination on the basis of political opinion often occurs in countries where a state of emergency has been declared, particularly when the situation continues for some time. In the *Sudan*, for example, a state of emergency was declared throughout the country in accordance with Constitutional Decree No. 2 of 30 June 1989; the Government stated that as a result all political parties and trade unions were dissolved and provisions were to be taken to terminate the service of all public service employees and all contracts with a public institution; it has provided no further information on subsequent developments. The Committee considers it important that all measures intended to safeguard state security must be sufficiently well defined and precise to ensure that they do not become instruments of discrimination on the basis of any of the grounds prescribed in the Convention.

---

[5] General Survey of 1988, para. 135.

[6] See Report III (Part 4A), Committee of Experts, Feb.-Mar. 1995, Convention No. 111, Egypt, p. 304.

[7] General Survey of 1988, para. 125.

[8] General Survey of 1963, para. 91; General Survey of 1988, para. 126.

[9] General Survey of 1988, para. 135.

196. Requirements of a political nature can be set for a particular job, but to ensure that they are not contrary to the Convention it is imperative that they be strictly limited to the characteristics of the post (specific and definable) and be in proportion to its inherent requirements, for example, in the case of some senior posts directly concerned with government policy. In *Cuba* the posts which are controlled by the Communist Party are those falling within the institutional structure established by Legislative Decree No. 67 of 1983 respecting the organization of the central administration of state; the only posts involved are certain political and high-level offices, namely ministers, deputy ministers, president, vice-president and certain executive posts which each institution determines according to its specific requirements. In *Germany* the Reunification Treaty (Chapter XIX, section III, Annex I, paragraphs 4 and 5) establishes the legal grounds for the dismissal of public servants of the former German Democratic Republic. Termination of the work relationship is permissible based on serious reasons which exist when the worker: (1) has violated the principles of humanity or of the rule of law, especially the human rights guaranteed in the International Covenant on Civil and Political Rights, or has violated the principles contained in the Universal Declaration of Human Rights; or (2) has been active for the former Ministry for State Security or the Department of National Security, and a continuation of the work relationship thereby appears unacceptable. In cases of this nature the Committee has followed the opinion of the Commission of Inquiry that examined a complaint against the Federal Republic of Germany under article 26 of the Constitution[10] in this respect, and has considered that the grounds for dismissal laid down were not sufficiently precise to ensure that there was no discrimination on the ground of political opinion. It observed that the dismissals of the public service education workers that took place under the Treaty were based on their former membership or position in certain political parties or organizations, and not on any conduct falling within the scope of what should reasonably be considered as an inherent requirement of the profession of teaching. The Committee does not accept the argument that in cases in which persons had been accused of having carried out political activities in the former German Democratic Republic, the more the person had, by the assumption of certain functions, identified himself or herself with that unjust regime, the more incriminated he or she was, and the less reasonable it was that this person hold a position in the current administration. With respect to the representation under article 24 of the ILO Constitution concerning the former *Czech and Slovak Federal Republic*, the Committee set up to examine the representation[11] considered that "among the functions covered by article 1 of Act No. 451/1991, those which entail particularly strict requirements of state security and of confidentiality may reasonably be subject to exclusions based on political opinion, given especially the context of recent and current events of history in Czechoslovakia. The exclusions imposed should nevertheless be in proportion to the inherent requirements of the particular jobs in question." For some of these functions, the Committee stated that "each ground for exclusion should be examined to ensure that it is in proportion to the requirements of security and confidentiality inherent in each particular job in the categories of functions concerned".[12]

---

[10] Report of the Commission of Inquiry appointed to examine the observance of Convention No. 111 by the Federal Republic of Germany, *Official Bulletin*, Supplement 1, Vol. LXX, 1987, Series B, paras. 514-519.

197. In *Bulgaria*, a Constitutional Court ruling (No. 8 of 27 July 1992) found to be contradictory to Convention No. 111, section 9 of the Preceding and Concluding Provisions of the Banks and Credit Activity Law, No. 25 of 1992, which provides that "persons who have been elected members to central, county, district, town and municipal leading bodies of the Bulgarian Communist Party, Dimitrov Communist Youth League, the Fatherland Front, the Union of Veterans in the Struggle against Fascism and Capitalism, the Bulgarian Trade Unions and the Bulgarian Agrarian Party or have been employed full time as high-ranking officials at the Central Committee of the Bulgarian Communist Party, as well as staff, and paid or non-paid collaborators of State Security may not be elected to the Banks' Boards and may not be employed [...] over the next five years". The Court held that this provision was also contrary to the national Constitution, which prohibits any privileges or restrictions of rights on specified grounds including convictions and political affiliation. The Committee recalls that the application of measures intended to protect the security of the State must be examined in the light of the bearing which the activities concerned may have on the actual performance of the job, tasks or occupation of the person concerned. Otherwise, there is a danger, and even likelihood, that such measures will entail distinctions and exclusions based on political opinion or religion, which would be contrary to the Convention.[13] In *Cuba*, personal verification forms containing information on a worker's moral attitude and social conduct are required at the time of recruitment. The Committee considers that requirements that refer to moral qualities and social conduct could only be admissible if they were closely linked to the inherent requirements of a particular job. In *Poland*, under Act No. 214 of 16 September 1982 (still in force) on the staff of state administrative bodies (section 3(4)) "persons may work for a public service only if they demonstrate, by their good citizenship, that they will properly discharge the duties of a worker of a state administrative body of a socialist country"; moreover, section 13 of the Order of the Council of Ministers of 8 November 1982 on the administrative application and appraisal of professional skills of public servants provides that "good citizenship" is to be taken into account in performance appraisals. These provisions are not in compliance with the Convention, and are due to be amended using the urgent constitutional procedure. In *Rwanda*, the law makes provision, as a condition for recruitment, for certificates of good conduct, living and morals and, for state employees, proof of loyalty to the authorities and national institutions.[14] The Committee considers these provisions to be contrary to the Convention, all the more so given that such certificates can be refused by the communal authority if it considers that the person concerned may be suspected of carrying on an activity prejudicial to the security of the State, without having to base its refusal on any provisions or procedures in this respect. A similar type of provision exists in *Germany*: although systematic inquiries concerning the loyalty of applicants for positions in the public service have been abolished in the two Länder of Baden-Württemberg and Rhineland-Palatinate, public officials are still required to sign the declaration of loyalty. The Committee recalls that following the conclusions of the Commission of Inquiry appointed under article 26 of the Constitution of the ILO,[15] it had commented on the obligation established by the national Basic Law, legislation and administrative practice to take an oath of loyalty prior to employment in the German public service; the application of these provisions by the Länder can give rise to dismissals or refusals to hire as a result of non-respect of the duty of loyalty. The Committee considers that the undifferentiated application of the duty of faithfulness to all officials, without regard to the effect which their political attitude or activities may have on the exercise of the functions assigned to them, does not appear to correspond to the inherent requirements of all the kinds of work involved. As the Committee has pointed out above in respect of *Angola* concerning the evaluation of the work of journalists, provisions that refer to ideological and political factors can affect both access to employment and security of tenure as well as working conditions. In *Cuba*, the parameters for evaluating journalists' work until 1993 included "the political, ideological, economic and social scope of the work performed"; they have since been amended and account is now taken of the scope and the repercussions on the public of their activities (with implications for their salaries and their continued employment).[16]

---

[11] Report of the Committee, *Official Bulletin*, Supplement 1, Vol. LXXV, 1992, Series B.

[12] Report of the Committee, paras. 67 and 69. Another representation on the same issues relating to the legislative text entitled the "screening law" was presented in Apr. 1994 against the Czech Republic, the State which succeeded part of the CSFR following the adoption of the new Constitution of 1 Jan. 1993. See the report of the Committee set up to examine the representation made by the Trade Union Association of Bohemia, Moravia and Silesia under article 24 of the ILO Constitution alleging non-observance by the Czech Republic of Convention No. 111, ILO doc. GB.264/16/2 (November 1995).

[13] General Survey of 1988, para. 136.

---

[14] S. 5 of the Legislative Decree of 19 Mar. 1974 respecting general Regulations for state employees and s. 6 of Presidential Order No. 227/01 of 20 Dec. 1976 respecting Regulations for personnel of public enterprises.

[15] Report of the Commission of Inquiry appointed to examine the observance of Convention No. 111 by the FRG, *Official Bulletin*, Supplement 1, Vol. LXX, 1987, Series B, Ch. 10.

198. With regard to *Norway*, the Committee has considered that a provision drafted in such a way that it allows employers to question job applicants about their political, religious or cultural views, even when such views are not relevant to the inherent requirements for their performance of certain jobs, conflicts with the requirements of Convention No. 111.[17] In March 1983 a representation was presented under article 24 of the Constitution of the ILO and a report was prepared by the Committee set up to examine it (see box below).

With respect to the Norwegian Worker Protection and Working Environment Act, 1977, section 55A of which provides that the employer is justified in questioning job applicants about their political, religious or cultural views if such information is required owing to the nature of the situation or where the activity of the employer has as an objective the advancement of specific political, religious or cultural views and the position is of significance for the accomplishment of the objective, the Committee set up to examine the representation presented by the Norwegian Federation of Trade Unions in relation to this provision concluded in essence that "in order to satisfy Article 1, paragraph 2, of Convention No. 111, regard must be had to the actual duties of the job in question and when necessary, to the direct bearing of these duties on the employing institution's objectives. Naturally, the fact that an organization has a particular ideology will be a reason for it to require that certain posts should be held by persons of that same ideology. In order to maintain consistency with the Convention, however, the responsibilities of such posts must be related directly to the pursuance or furtherance of the institution's objective. As a corollary, the Committee would suggest that in certain organizations, a consideration of the 'inherent requirements of the job' may involve such questions as whether there would be a risk that the pursuit of the institution's objective would be frustrated, undermined or harmed by employing someone in a particular post who did not share the ideological views of the organization. It is clear from the views expressed by the Committee of Experts, however, that distinctions made in these circumstances could only be justified under the Convention where the job itself carried special responsibilities".

Note: Report of the Committee set up to examine the representation presented by the Norwegian Federation of Trade Unions (LO) under article 24 of the Constitution alleging non-observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by Norway, *Official Bulletin*, Vol. LXVI, 1983, Series B, No. 1, paras. 10 and 29.

199. Combating discrimination based on political opinion in employment and occupation is also important in respect of free access to education, because of the impact this has on access to employment; nobody should be denied access to universities or other educational institutions or be excluded from them, whether in the capacity of student, teacher or public official, for having expressed a political opinion. For example, in *Chile* the excessively broad discretionary power granted in Decrees of 1973, 1974 and 1976 to university rectors to terminate the contracts of certain teaching and administrative staff is not compatible with the guarantees contained in the Convention. (The Committee has requested that these decrees be repealed.) In *Cuba*, under Resolution No. 590 of 4 December 1986 regulating the system of inspection in education, teaching methods and results must be analysed (as regards both objectives and inspection methods) from the point of view of the Communist Party of Cuba (section 2) and must be assessed in the light of their political, ideological and scientific content (section 8). Furthermore, national legislation allows the dismissal of members of the staff of higher education and other educational institutions, and staff of any educational establishment who come into direct contact with students, in particular for "serious and manifest activities that are contrary to socialist morals and the ideological principles of society". This legislation is liable to give rise to practices which discriminate against any worker coming into contact with young people in the educational context, enforceable by penalties which exclude them from their employment for a long period.

---

[16] s. 3, subs. (c) of resolution No. 17 of 16 Nov. 1993, regulating the evaluation of the work and pay of journalists.

[17] s. 55A of the Worker Protection and Working Environment Act, No. 4/1977.

200. Discriminatory practices and interference by the authorities also affect the press, as can be seen from the example of the evaluation of journalists' work in *Cuba* mentioned above.

201. In *Egypt*, section 18 of Act No. 148 of 1980 respecting the power of the press provides that persons prohibited from exercising their political rights or from forming political parties, persons professing doctrines that reject divine laws and persons convicted by the Court of Moral Values may not publish or participate in the publication of newspapers, or own newspapers. In addition, Act No. 33 of 1978 (repealed recently) imposed restrictions, enforceable by disciplinary penalties, on members of the journalists' trade union in respect of the freedom to publish or disseminate through the press or any other information media articles prejudicial to the "democratic socialist regime of the State" or to "the socialist achievements of the workers and peasants".

202. An important aspect of the application of the prohibition to discriminate on the basis of political opinion is the reinstatement of persons repressed in the past because of their political opinions, and the payment of compensation. For example, in *Bulgaria*, the Political and Civil Rehabilitation of Repressed Persons Act of 25 June 1991 has the objective of restoring the rights of persons who had been wrongfully repressed on account of their origin or political or religious convictions between September 1944 and November 1989. Two implementing decrees[18] apply the Act by setting out the specific procedural requirements, the categories of compensation and the amounts of compensation which are intended to cover losses incurred in employment and occupation; a Central Committee and regional committees for Political and Civil Rehabilitation have been established to help investigate and determine the circumstances of cases. In *Chile* a 1993 Act provides that provisional benefits will be granted to workers dismissed for political reasons between 11 September 1973 and 10 March 1990.[19] The new Act applies to the public and semi-public sector and to autonomous enterprises in which the State has a holding of at least 50 per cent, but it does not apply to the private sector, despite the fact that workers in that sector, although not dismissed through the intervention of the public authorities, were forced to resign after harassment due to their political opinions.

---

[18] Decree No. 139 of 21 July 1992 and Decree No. 249 of 9 Dec. 1992.

[19] Act No. 19.234 adopted on 5 Aug. 1993.

CHAPTER 2

Practical difficulties and principal obstacles to the application of the Convention

203. The Committee recalls the obligation of ILO member States under article 19(5)(d) of the Constitution to "take such action as may be necessary to make effective the provisions" of all ratified Conventions. This is an obligation to make the provisions of Conventions effective in law and in practice. It is therefore necessary, though not sufficient in itself, for the provisions of national law to be in conformity with the requirements of the Convention. It is also important for the law to be fully and strictly applied in practice.

204. Particular emphasis should be placed on the obligations incumbent upon the ratifying State, under Article 3(a) to (d) of the Convention, to seek the cooperation of employers' and workers' organizations in implementing the policy aiming at the elimination of discrimination in employment and occupation, to enact legislation in support of such policy, to repeal and modify statutory provisions and administrative practices inconsistent with the policy and to apply it to employment under the direct control of a national authority.[1]

205. In order to identify the obstacles to implementation at the national level of the principles set forth in the Convention, it is necessary to assess not only the legislative progress achieved but, above all, its application in practice. Consideration should also be given to the importance of actively promoting equality, in particular through a national policy appropriate to internal conditions, which implements the principles contained in the Convention, for example by means of practical activities, affirmative action or the activities of specialized bodies. Technical assistance by the International Labour Office, in particular mutually agreed collaboration in the form of advisory services and practical advice, may help to overcome obstacles or misgivings as regards the implementation of the guarantees laid down in the Convention.

---

[1] This position was also emphasized by the Committee set up to examine the representations made by the Trade Union Association of Bohemia, Moravia and Slovakia and by the Czech and Slovak Confederation of Trade Unions under article 24 of the ILO Constitution alleging non-observance by the *Czech and Slovak Federal Republic* of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), *Official Bulletin*, Supplement 1, Vol. LXXV, 1992, Series B, para. 97. The point was reinforced in a later representation concerning the *Czech Republic* on the same subject. See the report of the Committee set up to examine the representation made by the Trade Union Association of Bohemia, Moravia and Silesia under article 24 of the ILO Constitution alleging non-observance by the *Czech Republic* of Convention No. 111, ILO document GB.264/16/2 (November 1995).

> It is difficult to accept statements to the effect that the Convention gives rise to no difficulties or that the instrument is fully applied, especially when no other details are given on the contents and methods of implementing the national policy. The promotion of equality of opportunity and treatment does not aim at a stable situation that may be attained once and for all, but rather requires a permanent process so that national policy relating to equality of opportunity may be adjusted to changes in society in order to eliminate the various forms of distinctions, exclusions and preferences based on grounds laid down in the 1958 instruments.

A. Elimination of discrimination: Legislation and practical application

1. Legislation

206. There are several regulatory levels at which the Convention can be implemented nationally: the national Constitution, legislation (labour code, anti-discrimination or human rights legislation, and regulations), case-law and collective labour agreements. The Convention leaves it to each State to choose the levels at which it regulates the guarantees set forth in the Convention, within the framework established in Article 3. The Committee has always considered that where provisions are adopted to give effect to the principle laid down in the Convention, they should include all the grounds of discrimination specified in Article 1, paragraph 1(a), of the Convention.[2] For example, in *Togo* the 1980 Constitution ensured the equality of all citizens only on the basis of extraction, sex, creed or opinion, without mentioning the ground of race; in its first session of 1995 the Committee noted with satisfaction that the new Constitution included, in 1992, among the grounds relating to equality, those of race and ethnicity. In *Poland* a draft amendment of the Labour Code should expressly prohibit all discrimination in industrial relations based on sex, age, race, nationality, religious and political opinion, and trade union membership, as part of the legislative amendments necessary for the application of the Convention which have been under way since 1990, and which the Committee has welcomed with satisfaction.

207. Once this requirement has been met, other grounds may be added as provided in Article 1(b) of the Convention. Article 19 of the *Russian Federation's* new Constitution guarantees equality of rights and liberties irrespective of sex, race, nationality, language, origin, property or employment, residence, attitude to religion, convictions, membership of public associations or any other circumstance, which represents a fairly comprehensive list.

---

[2] General Survey of 1988, para. 58, and comments of the Committee of Experts.

208. As the Committee has already emphasized, it is not sufficient to guarantee the absence of discrimination in the country's basic law. In *Ghana* the new Constitution not only prohibits all discrimination on the grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status, but it also defines discrimination to mean "to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion, or creed". Furthermore it provides that "the State shall ... prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs". This clarification is useful and the Committee has stressed in respect of the Constitution of *Morocco* that the guarantee, in general terms, of equality before the law, freedom of opinion, the right to education, equal access to public sector jobs and functions, etc., is not sufficient to give effect to the Convention. The Constitution, the Labour Code or other specific legislation should explicitly guarantee equality of opportunity and treatment in employment and occupation and prohibit discrimination on all the grounds set out in the Convention and in all sectors of activity. In the *Dominican Republic*, for example, the Civil Service and Administrative Careers Act, No. 14/91, is not sufficient for the application of the Convention and the Labour Code does not apply to the public service. Although, according to the Government, this Act does not establish any distinction whatsoever for reasons of sex, age, race or colour, religious or political beliefs for admission to the civil service, there are nevertheless no specific provisions guaranteeing non-discrimination in this Act, except for those stipulating respectively that the performance appraisal of temporary workers must be fair and objective and that breaches of discipline must be judged and sanctioned according to their gravity, on the basis of strict criteria of lawfulness, equity and objectivity.

209. Several States are currently in the process of amending their legislation (other than constitutional provisions) or adopting new legislation to bring it into conformity with the Convention and apply it more effectively. In *Australia*, for example, 1993 amendments to the Industrial Relations Act, expressly state that helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, is now included as one of the desired objectives of the legislation. The text of Convention No. 111 is reproduced in the schedule to the Human Rights and Equal Opportunity Act, 1986. In *New Zealand* the above-mentioned Human Rights Act adopts the same form with a list of prohibited grounds of discrimination which includes political opinion (on the Committee's encouragement), although it will not be obligatory to apply this ground until after 31 December 1999. However, in the view of the New Zealand Council of Trade Unions, the fact that a number of the grounds of discrimination proscribed by the Human Rights Act are not contained in the Employment Contracts Act, 1991, is a significant omission from the key legislation regulating th employment relationship. For practical application it may not be sufficient fo a general Act such as the Human Rights Act to refer to unlawful grounds o discrimination, while there are such gaps in the key legislation governin employment relationships.

210. In accordance with the principle that a specific law creates a exception to a general law, but more importantly, in order to ensure a mor direct and immediate application of the Convention, it may be preferable for th prohibited grounds of discrimination to be stipulated in specific legislatio governing employment relationships, or in collective agreements. No occupatio should be excluded from the scope of protection of an anti-discriminatory law even if the exclusion only concerns a very specific sector of an occupation. I *Australia*, for example, section 24 of the Australian Capital Territor Discrimination Act, 1991, exempts from its scope of application the recruitmen of workers to carry out domestic duties in the employer's premises, but in al other aspects domestic workers enjoy the full protection of the legislation. I should be recalled that in many countries some categories of workers, such a domestic and agricultural workers, are excluded from the scope of th legislation.

211. There is an increasing tendency to provide in legislation for pena sanctions for acts of discrimination, making the prohibition of discriminatio more effective and allowing it to be applied in the private sector, even in th absence of any specific act regulating the subject. In *France* under section 416 of the Penal Code, a refusal to recruit based on discriminatory reasons i punishable by a fine and imprisonment. In the *Netherlands*, section 137(f) of th 1991 Criminal Code provides that anyone participating in acts of discriminatio on grounds of race, religion or conviction, sex or sexual orientation i punishable by imprisonment of up to three months or a fine; and the new sectio 429/4 of the same Code stipulates that personal acts of discrimination in person's exercise of office on the basis of the above-mentioned grounds ar punishable by imprisonment of up to two months or a fine. In *Brazil* an discrimination which violates fundamental rights and freedoms is punishable b law, and in particular any racist practices constitute criminal offences for whic release on bail is not granted. In *Finland*, as part of the reform of the Crimina Code, the question is being debated whether to make it a criminal offence fo an employer to discriminate against an applicant or a worker for a number o grounds listed in the draft text.

212. In respect of national constitutions which expressly provide tha international agreements and treaties prevail over national law, the Committe considers that constitutional clauses of this nature, which merely establish th supremacy of international law in the national legal system, are important for th application of the Convention, but in no way exempt the member State fro adopting national legislation to implement the principles laid down in th

Convention (especially in view of the fact that from the international law point of view the Convention does not contain any self-executing provisions).[1]

2. Practical difficulties

213. Appropriate national legislation that is in conformity with the Convention is a necessary, but not sufficient, condition for the effective application of the principles outlined in the Convention. There are a number of practical difficulties that may arise.

214. Some difficulties may relate solely to the contents of legislation, whilst others have more to do with the effective promotion of equality of opportunity in employment, not only in the public sector for employment under direct state control, but in the private sector. Obligations on private employers in respect of equality of opportunity can be laid down either in legislation or through collective bargaining. It is necessary for collective agreements to afford protection in keeping with the Convention's requirements and for such agreements not to undermine the effect of legislation relating to discriminatory practices if this is the method used to implement the Convention. For example, in *New Zealand* the Employment Contracts Act of 1991 asserts the primacy of individual negotiation over any collective approach, which would appear to give greater freedom for employers to resist obligations considered onerous and, in particular, obligations relating to equality of opportunity. Recourse to individual contract regimes could, in some situations, undermine the effective use of the entire range of protection against discrimination, including the personal grievance provisions, given that discriminatory decisions are far more easily masked by apparently objective assessments of performance and merit. Particular attention should be paid to provisions relating to dismissal which are imprecisely worded, such as article 191(b) of the Constitution of *Ghana*, which provides that no member of the public service shall be "dismissed or removed from office or reduced in rank or otherwise punished without just cause". The expression "without just cause" should be clarified in relation to the application of the Convention. Clauses enabling a public servant to be dismissed "for other significant reasons" must be interpreted in conformity with the Convention and not serve to uphold dismissals based directly or indirectly on an unlawful form of discrimination.

215. It is also essential for the rights established in a range of the various national texts to be made known to the public, in addition to the publication of legislation in the official gazettes of States. Workers are often not aware of their rights or do not grasp their significance. This lack of knowledge can mean that protective provisions remain a dead letter; for this reason brochures or guides are often published summarizing and simplifying the most important information.[4]

---

[1] Self-executing provisions in international treaties are those which may be applied directly without the ratifying State having to adopt legislation to give effect to the provisions concerned.

216. States that wish to eliminate discrimination and promote equality can display ingenuity and originality in the adoption of internal workplace rules or circulars, and of educational programmes and basic information to ensure the correct and effective application of the legislation implementing the principles laid down in the Convention. The Nordic countries, for example, designed the NORD-LILIA project in 1990 to manage the differences between men and women with a view to achieving equality. This project involves the collaboration of the universities of the Nordic countries in the field of discrimination, and the introduction of teaching methods designed to provide egalitarian education in schools. In *Spain*, from the beginning of the 1995 school year, the pupils in compulsory secondary schooling may choose equality between men and women as an optional subject. This course, entitled "Social roles of men and women", will enable pupils to understand the role accorded to women in occupation, society and the family. The aim is to avoid sexist attitudes, to analyse the past and present socio-cultural basis of sexist stereotypes, and to grasp the full significance of the distinction between legitimate differentiation between men and women on the basis of their biological differences, and unlawful differentiation based on socio-cultural grounds.

217. In an increasing number of countries, a shift of attitude is leading to progress in the level of education attained by groups discriminated against, but this does not necessarily bring about an immediate improvement in their career prospects. This situation is especially blatant in the case of women; at best, there are still very few women employed in top-level posts, although their numbers are increasing in the middle-management category. In general, the number of women in management or executive positions in enterprises and administrative bodies is relatively low owing to the tendency, still very much alive in some countries, for the directors of enterprises, institutions and other organizations to promote men rather than women.

---

[4] See, for example, in *Switzerland* see the guide entitled *L'égalité entre femmes et hommes dans l'entreprise. Perspective de réalisation* and the brochure entitled *Le harcèlement sexuel sur les lieux de travail: Les femmes rompent le silence*, published in 1993 by the Federal Office for Equality between Men and Women; in *Brazil* a brochure published in 1994 by the national commission to combat racial discrimination which was established by the Unique Workers' Central, entitled "For the application of ILO Convention No. 111", gives a brief general introduction to the problem of discrimination in employment and reproduces the text of the Convention in Portuguese.

The *Human Development Report* 1995, published by the United Nations Development Programme (UNDP), states that: "In administrative and managerial positions, the share of women is even smaller. An exception is *Hungary*, where women hold 58 per cent of such positions. In *Australia, Canada* and the *United States*, women hold about 40 per cent of such positions. Elsewhere, the percentages are quite low. In most developing countries, the proportion of women in administrative and managerial positions is less than 10 per cent. Even in industrially advanced *France, Japan, Luxembourg* and *Spain*, the share of women in such positions is less than 10 per cent. Thus, many high-paid career opportunities still are not open to women in many societies." (*Gender empowerment measure*, pp. 82-83.)

218. In the public service, the highest concentration of women is in administrative support, and opportunities for career development and advancement of women in such posts are still rare, which keeps women in positions of secondary importance. The practice of offering women training in limited and traditional areas is a contributing factor to this situation. In *Jordan* women's participation in vocational training programmes is very low and the training provided is mostly for activities traditionally carried out by women (with a marked increase between 1986 and 1989 in the industrial tailoring, pottery and copper-work sectors, and in the maintenance of office equipment). In *France* employment of women is still concentrated in a few categories (public service, enterprises, commerce and direct services to individuals, teaching, health and social work). This is the result of several factors, especially the very slow increase in the number of girls in scientific and technical training which leads to other types of jobs; the more limited access of women workers to continuous training, which reduces opportunities for occupational advancement; and the very slow change in the respective roles of men and women in the family. In *Canada*, according to the Canadian Consultation Group on Employment Equity for Women in the federal public service,[5] in order to right the imbalance of men and women in employment and to create a positive climate for women's career development, it will be necessary to provide diversity training, identify attitudinal barriers, be accountable for specific results, recognize the need for balancing work and family life, continue progress in moving women into non-traditional jobs and provide support through mentors. In *Peru* a sectoral commission of women officials of the Ministry of Labour was set up to revise the legislative provisions relating to work carried out by women and to take a number of measures to ensure the promotion of women, their participation in both the private and the public sectors, and also their technical and higher training for employment.

---

[5] One of the groups set up to evaluate action for the four employment equity target groups designated in the Federal Employment Equity Act, following the setting up of a parliamentary Commission in 1991.

219. In the current economic crisis, women are often the first to be hit by unemployment. In *Belarus* two-thirds of the total unemployed are women. In *Poland* during the massive lay-offs by enterprises in September 1993 as part of the restructuring of the Polish economy, 53 per cent of the unemployed were women. The National Commission of Solidarnosc states that in Poland female workers still constitute a group which is vulnerable to dismissals, especially those with family responsibilities or who take child-care leave; in this connection, it should be recalled that under section 177(1) of the Labour Code it is not possible to terminate a woman worker's contract of employment without notice while she is pregnant or on maternity leave, irrespective of the grounds for such termination; the only exception permitted is in relation to the liquidation or bankruptcy of the enterprise and in such cases the enterprise must reach agreement with the trade union on the whole termination procedure. Neither does the Polish Labour Code permit contracts of employment to be terminated while a worker is on leave, including child-care leave taken by working mothers, except in the event of liquidation or bankruptcy, or for other reasons in the case of massive lay-offs or individual terminations, if the trade union does not oppose such termination.

220. As the first to be hit by the economic crisis, women are also heavily affected by the increase in involuntary part-time work. For example, in *Finland*, according to the Central Organization of Finnish Trade Unions (SAK), the percentage of women part-time workers among its members has risen considerably during the 1990s and the majority of these women workers are employed on this basis against their will. The Committee stresses that, in accordance with Article 1(d) of the Part-Time Work Convention, 1994 (No. 175), full-time workers affected by partial unemployment, that is by a collective and temporary reduction in their normal hours of work for economic, technical or structural reasons, are not considered to be part-time workers. It is therefore important for the Committee to have statistical surveys at its disposal in order to be able to assess fully the extent of a situation that is discriminatory and to be able to determine how far the situation of women's employment and, more particularly, the increase in women's unemployment, whether total or partial, is the result of discrimination practised against them.

221. The other category of persons disadvantaged by the economic crisis is minorities. In *Romania*, for example, a report covering the period 1989-93 by the Romanian Institute of Research on the Quality of Life, in association with the International Child Development Centre (Florence, Italy), emphasizes in a special chapter devoted to the Roma that their unemployment rate, in Romania, is 52 per cent and that 74 per cent of them have no vocational skills.

222. In *Bulgaria* efforts are being made to try to solve the problems affecting some categories of particularly vulnerable workers, as the Government is of the opinion that "an increasingly unfavourable economic climate and growing unemployment are making it difficult to apply protective legislation relating to discrimination and to adopt appropriate measures to promote equality of opportunity for various categories of persons discriminated against", but emphasizes that "the application of provisions aimed primarily at ensuring the employment of vulnerable categories of workers on the labour market must, however, remain a priority".

B. Promoting equality: National policy, practical activities, institutional framework

> The elimination of distinctions in employment and education depends, on the one hand, on a general context of equality of opportunity and treatment without which the full application of Convention No. 111 would be illusory. This general context will depend on the fulfilment of two conditions: respect for the rule of law and development of a climate of tolerance. The first condition will depend on the role reserved for law and the channels of appeal open to persons who are victims of discriminatory practices. The second condition depends not only on the enactment of legislation but also on the promotion of education, as referred to in Article 3(b) of the Convention. It should embrace the entire field of employment and education, but should not be limited to these fields alone. The aim of such an education programme is to promote the development of a climate of tolerance, without which coexistence between minorities and majority, or even among the various minorities themselves, can only be fraught with conflict. (Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Romania of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), *Official Bulletin*, Supplement 3, Vol. LXXIV, 1991, Series B, paragraphs 604, 605 and 608.)

223. In accordance with Article 2 of the Convention, equality should be promoted by means of a national policy declared and pursued with a view to eliminating all forms of discrimination. In its General Survey of 1988, the Committee had noted a substantial change in the approach of national policies on equality of opportunity and treatment, which had broadened from an essentially standard-setting approach to embrace economic and social measures. At first, standard-setting mechanisms to eliminate discrimination were guided by the general principle of equality, which subsequently became more specific and incorporated equality in employment and occupation, all aspects of discrimination not necessarily being covered. The trend which has now clearly emerged towards economic and social action has led to the definition and implementation of affirmative action programmes.[6] These programmes of corrective measures are, in most cases, well defined and multi-faceted: whether they are presented as positive discrimination programmes in favour of certain categories of specially disadvantaged workers, or as practical activities, in particular in the area of training and education, or in the form of some other pragmatic solution, they are an offshoot of the realization that the prohibition of discrimination is not enough to make it disappear in practice, even if the prescriptive mechanisms are applied correctly.[7]

---

[6] General Survey of 1988, para. 163.

224. In *India* the struggle against discrimination in employment on the basis of social origin has resulted in quotas (27 per cent) in government posts for the socially and educationally backward classes (SEBCs). Of this quota preference is given to candidates belonging to the poorer sections of the SEBCs. These measures do not apply to socially advanced persons, known as the "creamy layer", whose membership of this layer is determined on economic grounds.

225. The States that have ratified the Convention face the necessary but complex task of effectively combating discrimination and promoting equality. Most States tend to set up institutional bodies which either concentrate on achieving equality in a specific area (for example, discrimination against women or racial and/or national minorities), as already discussed in Chapter 1 above, or which have a more general scope of activities relating to all forms of discrimination prohibited under the Convention. Usually two sorts of institutional body are set up, divided between those whose main role is both advisory and promotional, and those with quasi-jurisdictional powers which allow them to examine complaints lodged by victims of discrimination. Their different functions tend to influence the sort of obstacles that these bodies come up against in their work.

226. The following are significant national examples of institutional bodies which have promotional and/or consultative powers. In *New Zealand* the joint Equal Employment Opportunities (EEO) Trust was funded by employer subscriptions on the basis of a government decision to promote the principle of equal employment opportunities as good management practice. The Equal Employment Opportunities Fund allows the Government to support projects to encourage programmes and practices based on this principle in private sector establishments. Furthermore, throughout the country the Human Rights Commission has an educational and promotional function. This Commission, which each month replies to approximately 160 requests for information from individuals and various organizations, collects and transmits information on instruments to protect human rights and on individual cases of discrimination, and publishes books, manuals and guides on the subject and, in particular, on equal employment opportunities, discrimination, the situation of Maoris, sexual harassment and disability. Its information function consists of providing training courses for any individual, group or organization who may so request or who may be vulnerable to discrimination. In *Australia* the Human Rights and Equal Opportunity Commission, set up in 1986, monitors the application of various anti-discriminatory acts respecting racial and sexual discrimination and discrimination on the basis of disability. This Commission inquires into acts or practices that may infringe human rights or that may be discriminatory. In the event that infringements are identified, the Commission recommends action to remove them. It sponsors public discussion and also undertakes and coordinates research and educational programmes to promote human rights and to combat discrimination; it reviews whether state legislation conforms with international instruments relevant to human rights and provides advice on the drafting of legislative texts relating to human rights and non-discrimination; furthermore it conducts inquiries into individual complaints of discrimination, with a view to conciliation; it sets up advisory committees and intervenes in court proceedings involving human rights issues. In 1993 the federal Attorney-General established a National Advisory Committee comprising high-level representatives of the Human Rights and Equal Opportunity Commission, the federal and state governments, the Australian Council of Trade Unions, the Business Council of Australia, the Australian Chamber of Commerce and Industry and various community and interest groups, to advise the Commission on the performance of its functions in relation to equality in employment and to advise the Attorney-General, as requested, on the action that should be taken to comply with the Convention.

---

[7] See J. Faundez: *Affirmative action: International perspectives* (ILO, Geneva), 1994.

227. Bodies with an advisory and/or promotional function are often set up by the same acts that guarantee equality of opportunity and treatment in employment and profession, or by government decisions. Their structure is often tripartite in nature, given the fact that they are made up of representatives from the main interest groups, which means that when measures or national practices are being adopted, the broadest possible consensus can be reached in the areas concerned, this being the first step towards an effective national anti-discrimination policy. Institutional bodies of this kind essentially generate three types of action plan: studies and establishing a basis for legislation; the adoption of practical measures to increase the participation of persons discriminated against in all economic sectors; and the development of education and training. The major obstacle faced by these national bodies, apart from the initial difficulty of reaching consensus in the areas concerned, is a financial one, particularly apparent during periods of economic downturn. It seems that the lack or insufficiency of funds can not only hinder the successful implementation of the various plans of action prepared by these bodies, but can also make it difficult to obtain precise information, on the basis of reliable statistics or exhaustive studies, on the true extent of discriminatory situations. An absence of information of this kind makes the promotion of equality ineffective. For example, in *Brazil* the Government considers that one of the reasons that *de facto* discrimination continues is the recessionist policy and the austerity programmes set up to reduce inflation and the public debt.

228. Institutional bodies with quasi-jurisdictional functions are becoming increasingly numerous. The term "quasi-jurisdictional" is used because, barring a few exceptions, these are not usually real courts, although their structure and their investigatory and decision-making powers make them similar, if not equal. The use of the term "quasi-jurisdictional" is also intended to distinguish these bodies from ordinary labour tribunals, which have a broader jurisdiction, and which are competent to exercise jurisdiction over any dispute concerning worker-employer relations.

229. Two examples illustrate the functions of the quasi-jurisdictional institutional bodies. The first, concerning *Canada*, relates to all forms of prohibited discrimination in employment and occupation. It is the Employment Equity Tribunal (the Tribunal) established by the Employment Equity Act of Ontario which came into force on 1 September 1994. It is responsible for settling disputes relating to the implementation of equity in the workplace: it aims to achieve conciliation between the parties or conducts hearings to find out whether, in the case in point, the Act has been respected. These hearings are not as formal as judicial proceedings, but the resulting decisions are nevertheless binding on the parties. The Tribunal must endeavour to settle disputes by mediation before proceeding with a hearing, and all requests are therefore referred to a mediator. If the mediation process fails, the dispute is then heard and after examining the evidence and related legislation, the Tribunal returns its decision on the request.[8] The second example concerns *Uruguay* and targets a very specific area, being limited to complaints on sexual discrimination. Under the Act to Guarantee Equality of Treatment and Opportunity for Both Sexes, No. 16045 of 1989, there are two possibilities of eliminating discriminatory practices at work. The victim of discrimination can, on the one hand, lodge a complaint with the Ministry of Labour and Social Security, which will impose penalties on the employer of progressive severity ranging from warnings to fines or the closure of the establishment. On the other hand, and without precluding the possibility of referring the matter to the above-mentioned Ministry, the victim of discrimination can also use judicial remedies by bringing an action before the industrial tribunal. If the employer at fault does not comply, he will have to pay a fine for each day of non-compliance, which will be paid to the victim.[9]

230. The main duty of these quasi-jurisdictional bodies is to receive and, by adopting final decisions that are binding upon the parties, resolve cases of discrimination, generally relating to individuals but sometimes involving a number of persons. The burden of proof can be a significant hurdle in the way of obtaining a just and fair result in a case of alleged discrimination, whether indirect or direct. For example, in a discrimination case involving initial hiring or promotion, the complainant applies for a position and is rejected, allegedly for a discriminatory reason. Usually information concerning the criteria for selection, and the qualifications and assessment of the various candidates for the position lies mainly within the knowledge of the employer. This is particularly true in cases of indirect discrimination when the actual criteria of selection for a position may have been established over many years. In many countries, the burden of proof lies on the complainant, with the employer not obliged to produce evidence tending to show that non-discriminatory reasons explain the rejection. The employer may win the case simply by saying nothing and by merely challenging the inferences drawn by the complainant. The Committee notes with interest that in some countries, once the complainant has produced plausible or prima facie evidence of discrimination, the burden of proof shifts to the employer.

---

[8] Newsletter of the Employment Equity Commission (EEC), Vol. 1, Spring 1995, p. 3.

[9] Aporte editorial del diario La República, Discriminación en el trabajo: Normas Vigentes en el Uruguay, Instituto del Derecho del Trabajo, Facultad de Derecho-Universidad de la República.

231. Some countries have responded to this problem. For example, in *Switzerland* the new federal Act respecting equality between men and women which will come into force in mid-1996 provides (section 6) for the presumption of the alleged discrimination "as long as the person invoking the procedure makes a plausible case". The Committee considers that allocating the burden of proof in this way may be a useful tool to correct a situation that could otherwise result in inequality. Countries such as *France*, *Germany* and *Italy* have opted for similar systems in respect of the burden of proof. The Committee recalls that in its General Survey of 1988, it stressed that:

> One of the most important procedural problems that arises when a person alleges that there has been discrimination in employment or occupation is connected with the fact that the burden of proving the discrimination underlying the act complained of lies with the complainant, which may represent an insurmountable obstacle as regards affording remedies for the harm suffered. While at times the evidence can be collected without undue difficulty (in the case, for example, of advertisements for job vacancies where the discrimination is obvious), more often the discrimination involves an action or activity that is suspected rather than established and difficult to prove, particularly in the case of indirect or systematic discrimination, and more so when the information and records that might constitute evidence are generally held by the person being accused of discrimination.[10]

The Committee examined this question in relation to protection against anti-union discrimination in its General Survey on freedom of association and collective bargaining in 1994 (see in particular paragraphs 217 and 218).

232. Another obstacle to the effective application of the right to lodge a complaint before a quasi-jurisdictional body, and also before an ordinary court empowered to settle this sort of dispute, is the victims', as well as the witnesses', fear of possible reprisals by the employer. In *Brazil*, the absence of specific complaints in respect of discrimination on the basis of sex or colour is considered by the Government to be due to the fact that the victims refuse to be identified out of fear of reprisals and also because they entertain doubts as to the effectiveness and impartiality of the public authorities. Reprisals can take different forms, but in the majority of cases the worker and the persons who helped him or her are dismissed.

233. With regard to the effectiveness of the sanctions handed down by quasi-jurisdictional bodies, the victims of discrimination should benefit from suitable remedies which should also have a dissuasive effect upon those who may consider engaging in discriminatory practices. It should be kept in mind that by instituting such procedures a worker is taking both material and moral risks. For example, legislation which includes protective provisions, but which allows the employer in practice to terminate the employment of a worker who has been the victim of discrimination, on the condition of simply paying compensation, does not provide sufficient protection.[11] It is just as important for the effectiveness of an appeals procedure in the case of discrimination, that the matter be dealt with quickly, so as to prevent the unlawful situation from continuing, with the negative consequences that may imply for establishing the facts.

---

[10] General Survey of 1988, para. 224.

234. Victims of discrimination without financial means should have the possibility of free legal assistance, especially if the case is fairly complex. In *Spain*, article 24(2) of the Constitution establishes the right of every person to legal assistance. In *Australia* financial assistance for the expenses involved in an inquiry by the Human Rights Commission, following a complaint relating to discrimination on the basis of sex, can be provided both to the complainant, if the complaint is found to be justified, and to the person against whom the complaint is being made who has committed, or is accused of having committed, a discriminatory act on the basis of sex, when the complaint is found not to be well-founded. Legal as well as financial assistance can be granted for proceedings before the Federal Court on the same basis if it is found that the person requesting it would otherwise find himself or herself in a very difficult position.[12]

C. Assistance by the International Labour Office to implement the Convention

235. Through its active partnership policy the International Labour Office has developed assistance for its constituents in the form of targeted advisory services aimed, in particular, at a more effective and fuller implementation of the basic Conventions. One of the long-standing forms of technical assistance provided by the Office is assistance in the drafting of national labour legislation and/or the revision of existing legislative texts. There is a wealth of examples, but we will limit ourselves here to mentioning a few significant ones which the Committee has followed up. In 1994, the Office provided *Egypt* with ongoing technical assistance for the revision of the Egyptian Labour Code. A potential obstacle to effective technical assistance in this area is the sometimes excessively long adoption period for legislation amended in this way, which may be due to a lack of consensus among the social partners in situations where tripartism lacks vigour. In *Bolivia*, for example, the draft revision of the General Labour Act was drawn up with technical assistance from the Office at the end of 1990. However, despite the fact that it was disseminated in workers' and employers' confederations (without, however, eliciting their comments) the draft has not yet been adopted. In order to achieve consensus for the adoption of more specific reforms of the legislation in force, the Government has entered into discussions with trade union and employers' organizations. It should be emphasized that technical assistance provided at the request of the countries concerned usually results in the adoption of legislation in conformity with the principles of Convention No. 111. The Office's technical and material assistance to carry out studies or evaluations of the employment situation in specific countries can also result in more effective application of the Convention. In *Mali*, for example, a project to evaluate the work of women and children essentially focusing on the protection of women and children against hazardous and unhealthy work and night work should make it possible, especially by means of the statistics that will be collected, to have a clearer picture of the situation with respect to Convention No. 111, inter alia, as regards equal access of men and women to education and occupational training, to employment and occupation, and equal treatment in the field of working conditions. The lessons to be learned will also help the Government to apply the Convention better.

---

[11] General Survey of 1988, para. 228.

[12] ss. 83 and 84 of the Sex Discrimination Act, 1984, as amended in 1991.

236. The Office also provides technical assistance at the request of governments which find themselves facing difficulties in the practical application of the Convention and which wish to solve those difficulties with the Office's help. For example, when the problems it has encountered in applying the Convention were discussed by the Committee on the Application of Standards during the International Labour Conference in June 1995, the Government of *Brazil* asked for specific assistance to be organized by the Office, beginning with a series of tripartite national seminars, in order better to apply national legislation, in particular recently adopted legislation, and to raise the social partners' awareness of the principles laid down in the Convention.

237. As part of its policy to promote awareness of the principles of the Convention and their application, and for educational purposes, the Office also regularly organizes tripartite regional or sub-regional seminars, depending on each case, to promote equality of opportunity and treatment in employment.

238. Another form of ILO action is along the lines of the project for affirmative action in *Namibia*, financed by the Australian Government. This project is at the consultation phase and should be implemented over a two-year period (1996 and 1997). It consists of technical assistance to put into practice the principles of non-discrimination contained in the Constitution of Namibia and to implement labour legislation, with the aim of helping this country to achieve post-apartheid transition in the area of equality in employment.

CHAPTER 3

The emergence of other grounds

239. By providing for the possibility of establishing other grounds of discrimination besides the seven listed in paragraph 1(a), or the emergence of new grounds, paragraph 1(b) of Article 1 of the Convention and the corresponding Paragraph of the Recommendation expand the scope of these standards to any new discriminatory situation that may occur. The two previous chapters mentioned that the legislation in some countries has included such grounds as membership of trade unions and other associations, national extraction or citizenship,[1] marital status or pregnancy, and employment status; but these provisions are too few and far between for one to draw specific conclusions or detect a significant trend. The same does not apply to three other grounds of that are becoming more and more prevalent — age, state of health and sexual orientation. A tendency has been noted in a growing number of countries to legislate in order to ensure protection against discrimination based on these grounds. This chapter will examine the other grounds referred to in the Convention in addition to those identified in Article 1, those indicated in other ILO Conventions and those that emerge from national legislation.

A. Grounds referred to in Article 5 of the Convention

240. During the preparatory work on the Convention, the grounds of discrimination referred to in the Office's questionnaire were race, colour, sex, language, religion, political or other opinion, nationality, social origin, fortune, birth and other conditions.[2] In the light of the replies from governments and the first discussion by the Conference technical committee, the grounds of race, colour, sex, religion, political opinion, national extraction and social origin were considered fundamental to the issue. It was stressed that governments did not wish to include nationality as one of the grounds,[3] and an amendment seeking to ensure equal treatment for foreign workers was rejected. It was, however, considered important and appropriate that Recommendation No. 111 contain a reference to the Migration for Employment Convention (Revised), 1949 (No. 97), and the corresponding Recommendation (No. 86), which refers to the situation of immigrant workers who have completed an initial period of regular residence. Other amendments seeking to include other grounds, such as citizenship, language, age, disablement and membership or non-membership in a trade union were rejected by the Committee at its first discussion.[4]

---

[1] In certain countries, as explained above (para. 33), these terms apply to different concepts.

[2] ILO: *Discrimination in the field of employment and occupation*, Report VII(1), ILC, 40th Session, 1957.

[3] ibid., Report VII(2).

241. At the second Conference discussion in 1958 an amendment which would again have included "membership or non-membership of a trade union" in Article 1 of the proposed Convention was rejected. Other amendments concerning the interpretation of "national extraction" were rejected, but the Committee asked that the following definition be inserted in its report: "The Committee agreed that distinctions, exclusions or preferences made on the basis of national extraction meant distinctions between nationals of the ratifying country made on the ground of foreign ancestry or foreign birth."

242. While Article 1 of the Convention defines the term "discrimination", Article 5 defines what is not deemed to be discrimination (following consultation with employers' and workers' organizations), as in the case of special measures designed to meet the particular requirements of persons for whom it is recognized that special protection or assistance is necessary. For the purposes of this definition, grounds were given for measures intended to protect disadvantaged workers, namely sex, age, disablement, family responsibilities or social or cultural status. On the subject of these latter grounds, it was stated in the course of the preliminary work that "in regard to 'cultural status' the type of measures envisaged were those taken, for instance, in certain Latin American countries in favour of Andean Indians or in India in favour of certain tribal populations, with a view to helping them to take their proper place in the community. The type of measures based on 'social status' included, for instance, those sometimes taken to facilitate access to training opportunities for children from specially depressed classes or castes".[5]

B. Grounds referred to in other ILO instruments

243. The Committee notes that grounds such as age, nationality, trade union membership, disability and family responsibilities are included in other ILO instruments as reasons in respect of which discrimination in employment is prohibited. As pointed out above, age has already been referred to in connection with the special measures that may be adopted under Article 5. The relevant standards are:

---

[4] ILO: *Discrimination in employment and occupation*, Report IV(1), ILC, 42nd Session, 1958.

[5] ILC, 42nd Session, 1958, Annex VI, *Record of Proceedings*, para. 30.

(a) Age

Maternity Protection Convention, 1919 (No. 3), Article 2;

Night Work (Women) Convention, 1919 (No. 4), Article 3;

Night Work (Women) Convention (Revised), 1934 (No. 41), Article 3;

Night Work (Women) Convention (Revised), 1948 (No. 89) [and Protocol, 1990], Article 3;

Migration for Employment Convention (Revised), 1949 (No. 97), Article 6, paragraph 1(a)(i);

Plantations Convention, 1958 (No. 110) [and Protocol, 1982], Article 46;

Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), Article 6;

Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123), Paragraph 9(2);

Human Resources Development Recommendation, 1975 (No. 150), Paragraph 50(b)(v);

Older Workers Recommendation, 1980 (No. 162), Paragraph 3;

Termination of Employment Recommendation, 1982 (No. 166), Paragraph 5(a).

(b) Nationality

Maternity Protection Convention, 1919 (No. 3), Article 2;

Maternity Protection Convention (Revised), 1952 (No. 103), Article 2;

Plantations Convention, 1958 (No. 110) [and Protocol, 1982], Articles 2 and 46;

Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), Article 6;

Seamen's Welfare in Ports Recommendation, 1936 (No. 48), Paragraph 3;

Vocational Training (Agriculture) Recommendation, 1956 (No. 101), Paragraph 3(1);

Indigenous and Tribal Populations Recommendation, 1957 (No. 104), Paragraph 35(b);

Plantations Recommendation, 1958 (No. 110), Paragraph 2.

It should be noted that the ground of nationality is fundamental to the standards relating to migrants and that provisions intended to ensure them equality of opportunity and treatment and/or protection against discrimination are therefore included in the corresponding instruments, namely: Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48), Articles 2 and 10; Migration for Employment Convention, 1939 (No. 66); Migration for Employment Convention (Revised), 1949 (No. 97), Article 2; Equality of Treatment (Social Security) Convention, 1962 (No. 118), Article 3; Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); Maintenance of Social Security Rights Convention, 1982 (No. 157); Migration Statistics Recommendation, 1922 (No. 19); Migration for Employment Recommendation, 1939 (No. 61);

Migration for Employment Recommendation (Revised), 1949 (No. 86); Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100), Paragraph 45.

(c) Trade union membership

Social Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82), Article 18(1) and (2);

Right to Organize and Collective Bargaining Convention, 1949 (No. 98), Article 2;

Plantations Convention, 1958 (No. 110) [and Protocol, 1982], Article 2;

Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), Article 14(1) and (2);

Social Policy in Dependent Territories Recommendation, 1944 (No. 70), Article 41(3);

Plantations Recommendation, 1958 (No. 110), Paragraph 2;

Workers' Housing Recommendation, 1961 (No. 115), Paragraph 25.

Trade union membership of migrant workers is referred to in Recommendation (No. 100), Paragraph 38, and in the Migrant Workers Recommendation, 1975 (No. 151), Paragraph 8(3).

(d) Disability

Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), Article 6;

Employment (Transition from War to Peace) Recommendation, 1944 (No. 71), Paragraph 43(3);

Vocational Rehabilitation (Disabled) Recommendation, 1955 (No. 99), Paragraphs 25 and 41.

(e) Family responsibilities

Workers with Family Responsibilities Convention, 1981 (No. 156);

Workers with Family Responsibilities Recommendation, 1981 (No. 165).

C. Grounds contained in other international instruments

244. In addition to instruments adopted by the ILO, the Committee also notes that other international human rights Conventions adopted since the adoption of Convention No. 111 in 1958, have further expanded the protection offered in international law against discrimination. The Committee believes that, with a view to the coherence of international human rights law, it would be desirable to take these into account in considering the present Convention. In particular, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, both adopted in 1966, both contain the following passage:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [6]

While this list closely resembles that in Convention No. 111, it may be seen that it adds the criteria of language, property and birth. The Committee considers that "birth" in this context refers to the same notion as "social origin" in Convention No. 111 as well as to the concept of "legitimacy" at birth. The Covenants also include political "or other" opinion, as well as the general heading of "other status".

245. On the regional level, the Committee notes also the European Convention on Human Rights, adopted in 1950, which in its Article 14 prohibits discrimination on the basis of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status", which closely resembles the list in the two United Nations Covenants.

D. Grounds of discrimination that are emerging

246. As previously indicated, age is one of the grounds referred to in Article 5 of Convention No. 111, but it is also increasingly the subject of legislation in many countries. Other new grounds are emerging, such as state of health and sexual orientation.

(1) Age

247. New legislation frequently makes specific reference to age among the grounds of discrimination that are prohibited (e.g. section 21 of *New Zealand's* Human Rights Act of 1 February 1994). Australia is currently examining the possibility of action to prevent age-based discrimination, according to the most recent report on Convention No. 111. When age is included in the scope of the Convention, this ground should be taken into account especially in the situations described below.

248. The Committee recalls that in its 1988 General Survey it observed that, within the meaning of the Convention, recourse to age limits is not deemed to be discrimination if the employer can prove that age is an occupational requirement justified by the nature of the job. [7] Consequently, upper age limits for access to specific categories of employment, such as the public service, should be reviewed. In *Bangladesh* the age limit for access to employment has been set at 30 years for both men and women in governmental, semi-governmental, autonomous and nationalized establishments, which cannot be considered as conforming to the provisions of the Convention. Such a limit would be justified, particularly for reasons involving the safety or health of workers or third parties, in jobs where risk is a factor, such as those of airline pilots, police officers, fire-fighters, bus drivers, etc.[8] National courts are, however, less and less inclined nowadays to consider age as a bona fide occupational requirement in employment categories where safety considerations are paramount when there is no proof of the effects of age on safety.

---

[6] Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, and Article 2(1) of the International Covenant on Civil and Political Rights.

[7] General Survey of 1988, para. 73.

249. This view is reflected in a decision of the Ontario *(Canada)* Court of Appeal of 22 December 1993, which upheld the decision of the Board of Inquiry established by the Canadian Human Rights Act. The Board stated that compulsory retirement at the age of 60, imposed by the Stratford Police Department, did not constitute a bona fide occupational requirement. It pointed out that in such an instance "a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the law. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public". (Decision Large v. The Corporation of the City of Stratford, in *Canadian Labour Law Reports*, Vol. 4, 16,019.)

250. Discrimination based on age, which is probably the issue that receives most attention nowadays, must be seen in terms of the compulsory retirement age and how it affects the working conditions of older as well as younger workers. The setting of a compulsory age limit for everyone and every sector of activity could under certain conditions be discriminatory. In *Canada*, for example, the question was raised as long ago as 1979 whether the practice of mandatory retirement should constitute a discriminatory practice prohibited by legislation; it was understood that if employers could establish that workers above a certain age could not carry out the functions of a particular position, this would form a bona fide occupational requirement. However, age should not arbitrarily be used as a criterion with the result that capable persons who desire to work are denied employment on the basis of their age alone.[9]

251. In *France*, section L.122-14-11 of the Labour Code stipulates that provisions relating to the retirement of employees under a collective agreement, labour agreement or contract of employment are applicable provided they do not contravene legal provisions. Any provision of a collective, or other type of labour agreement, or any clause of a contract of employment providing for automatic termination of a contract when an employee reaches a certain age or is entitled to draw an old-age pension, for example, is null and void. On 8 November 1989, the Court of Cassation ruled that an employer terminating a contract of employment of a worker who has reached the normal age of retirement set by collective agreement, for no reason other than age, must compensate the worker's dismissal as being without real and serious cause. In certain countries there is a tendency for compulsory retirement age no longer to coincide exactly (if at all) with the qualifying age for retirement benefits, and for flexible ways of terminating the employment relationship to be introduced which do not prejudice one's right to a retirement pension. (It should be recalled that Paragraphs 20 and 21 of the Older Workers Recommendation, 1980 (No. 162), address this issue.)

---

[8] ibid.

[9] Canadian Human Rights Commission, *Annual Report 1979*; General Survey of 1988, para. 73.

252. Discrimination on the basis of age may also result from the economic restructuring of enterprises, when the youngest and oldest workers become the main target of dismissal. In *Chile*, for example, Workers' Trade Union No. 7 (Codelco Chile) communicated observations to the Committee concerning a restructuring plan aimed at bringing an autonomous enterprise's human resources more into line with actual needs, allegedly through early retirement and discriminatory practices based on age. It was decided that discrimination was not proven because prior consultations had been held with workers and their representatives to encourage some of them to take early retirement, with due regard for existing standards and constitutional provisions. This type of situation resulting from economic constraints is not discriminatory in itself; it may, however, be considered as such when dismissals or early retirement are applied arbitrarily, without criteria which would enable workers to assess whether inappropriate discrimination is involved, or without prior consultation of the workers concerned and their representatives.

253. There are other age-related practices that lead to indirect discrimination based on grounds prohibited by the Convention. One major consequence of equality of treatment relating to age-based discrimination concerns entitlement to social security benefits and unjustified distinctions between men and women in this regard. Most countries, however, have set the same age for both sexes for a retirement pension. In *Switzerland* the tenth revision of the Old-age and Survivors' Insurance (AVS) Act, approved by Parliament on 7 October 1994 and subsequently adopted by popular referendum, increased the retirement age for women (from 62 years to 64 years, in two steps) in order to put both sexes on an equal footing.

254. As regards grounds for intervention in the area of seniority for promoting access to equal treatment, in *Canada* on 29 June 1993 the Quebec Human Rights Commission adopted a document entitled *Accès à l'égalité, ancienneté et discrimination* (Access to Equality, Length of Service and Discrimination). This analyses the problems that may arise when the principle of seniority or length of service as contained in collective labour agreements between employers and workers creates an obstacle to implementing or maintaining programmes for equality in employment. The Commission refers particularly to the case when the seniority system in force in an enterprise prolongs the effects of previous discriminatory practices with regard to women and ethnic minorities, for example. To overcome this problem, a three-stage process of intervention has been proposed. First, an analysis of the seniority system in order to identify the rules which have a discriminatory effect or which may slow down or compromise the objectives of programmes of access to equality. Second, negotiated solutions between employers and representatives of workers, which provide for preferential compensatory measures for the seniority system. Finally, if adequate adaptation measures are not taken, the Commission may intervene, and even bring an action before the Human Rights Commission.

(2) State of health

255. A worker's state of health should only be taken into consideration by employers with regard to the specific requirements of a particular job, and not be considered automatically as affecting the right to access to employment, or conditions of work within the employment relationship.[10] Taking into account the past or present physical or mental state of health of an individual could be a major barrier to applying the principle of equal access to employment. Unless there is a very close link between a worker's current state of health and the normal occupational requirements of a particular job, using state of health as a reason to deny or continue employment contravenes the spirit of the Convention. In prohibiting discrimination based on state of health, a distinction must be made between physical or mental disabilities and other types of illness that are not necessarily disabling, and those which are. It may also be necessary for employers to accord flexibility, in certain cases, for instance to allow time off for treatment if workers are ill but not incapacitated for the jobs they hold. Measures of different kinds have been taken concerning discrimination on the basis of state of health.

256. As concerns the state of health generally, in *France*, section L.121-6 of the Labour Code[11] stipulates the information which may be requested of job applicants and workers and imposes two conditions: first, the sole purpose of such information must be to evaluate the person's ability to perform the job and to assess his or her occupational skills; second, this information must have a direct and necessary bearing on the job offered or the assessment of occupational skills, and applicants are required to provide such information in good faith. Section L.122-45 of the Labour Code extends the scope of the protection afforded by this section to all persons who may be excluded from recruitment, in particular by reason of their state of health, except where they have been declared unfit to perform the job by a works physician in accordance with law. As in other countries, in *Finland* reform of the Penal Code will make it a punishable offence for an employer to discriminate against a jobseeker or a worker, inter alia, on the basis of his or her state of health.

---

[10] General Survey of 1988, para. 70.

[11] Act No. 92-1446 of 31 Dec. 1992 respecting employment, part-time work and unemployment insurance.

257. More and more countries have adopted measures to protect the disabled and promote equality of opportunity between disabled and other workers. The most recent example is the new Labour Code which *Gabon* adopted in 1994 and which entered into force in January 1995. Chapter 5 of this Code contains a series of provisions for protecting disabled workers. For example, given equal qualifications any discrimination based on a person's physical or mental disability is strictly prohibited during the hiring process, while the contract of employment is in force or upon its termination. Employers hiring the disabled must, whenever possible, provide them with access to all areas of the workplace, taking into consideration the worker's disability. A minimum of one-fortieth of an enterprise's total workforce must be reserved for disabled persons who meet the occupational requirements. Employers with a workforce of 40 or more must inform the labour inspectorate in writing each year of the total number of employees, the number of disabled employees and the type of disability in each case; and in the event of termination for economic reasons, the employer must take all possible steps to retain disabled workers.

258. Other countries have also adopted legislation protecting the rights of disabled workers. In *New Zealand* legislation of 1975 concerning disabled persons[12] provides for assistance intended to make these persons socially and financially independent. Its provisions are aimed at promoting training activities for the disabled, providing them with jobs, and arranging for their transportation to training or work. This Act supplements the Disabled Persons Employment Protection Act, 1960, which, according to the Government, gives incentives to community organizations to provide sheltered jobs and other vocational services for the disabled. In *Poland*, the Act of 9 May 1991 concerning employment and vocational rehabilitation of the disabled provides for employment opportunities for disabled persons who are able to work, as well as loans for those wishing to start up their own business; for the disabled who cannot work, therapy workshops are organized; a Committee on Employment and Disabled Workers determines the ability of a disabled person to work.

259. Disabled women run the risk of "double discrimination". For working women, any physical or mental disability becomes an even greater barrier to equality in employment than would be the case for a disabled man.[13]

260. Although generally speaking disabled workers are increasingly becoming the focus of the campaign against discrimination in employment, the same does not hold true for all workers suffering from all types of illness. A current problem linked to state of health — even more serious as no effective and reliable cure for the illness has yet been found — is discrimination against workers who are HIV-positive or who have contracted AIDS. Science's inability so far to bring the disease under control, plus widespread ignorance of the effects of the virus and ways in which it is transmitted, spread fear among people, resulting in prejudice and inequality.

---

[12] Disabled Persons Community Welfare Act.

[13] Report by the Government of *Finland* on the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/FIN/2 of 8 Apr. 1993, pp. 65-66. See also Sheila Stace: *Vocational rehabilitation for women with disabilities* (ILO, 1986).

261. It is in relation to the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS) that countries have examined most urgently the need to eliminate discrimination in employment and occupation on the basis of the state of health. If the following section focuses closely on these afflictions, it is because they have given rise to an extremely rapid and widespread attention to this question. It may be expected that, even if anti-discriminatory measures tend for now to concentrate on HIV/AIDS, the lessons learned in this context are likely to be generalized to other aspects of the broader question.

262. It should also be noted that the ILO has a particular interest in this problem, as discrimination on the basis of HIV infection affects an increasing number of workers; and beyond this, accelerating infection rates devastate workers and workplaces. This question was already discussed by the Committee in the 1988 General Survey (paragraph 71); and later that year the ILO and the World Health Organization adopted a joint Statement from the Consultation on AIDS and the Workplace[14] which contains provisions on, inter alia, discrimination in the workplace. The following description of measures being taken in various countries in this regard is therefore of particular interest.

263. Those countries with legislation and regulations on this subject consider that a definition of unlawful discrimination based on the HIV status of a worker should be as broad and universal as possible. Such a definition should include discrimination against both symptomatic and asymptomatic carriers of the virus, as well as that based on the mere suspicion that an individual could be a carrier because he or she belongs to a so-called high-risk group, or because of his or her relationship with a carrier. For example, in *Canada* HIV/AIDS infection falls within the scope of the prohibition of all discrimination based on disability, a prohibition that has accordingly been given a broad interpretation. In this regard, the Canadian Human Rights Commission has stated that it will investigate complaints of discrimination concerning both symptomatic and asymptomatic carriers of the disease.

264. Discriminatory practices may take many forms, which are often hidden. For example, workers may be questioned about their HIV status, or be required to submit to AIDS screening, most often without their knowledge. They may also be dismissed solely on the grounds of their HIV status. Each of these practices constitutes discrimination. Although there are occupations in which HIV status should be taken into account, they are very few. In order for HIV status as such to be a valid ground of discrimination, it must constitute a barrier to performing a particular job. While HIV-positive status is an unacceptable ground of discrimination, and has been so designated for most jobs in an increasing number of countries, there are occupations in which a person's HIV-positive status should be taken into account when his or her fitness for a job is being assessed. For example, nurses, doctors or dentists whose field of specialization (such as surgery or the administration of injections) involves a risk of contact that could transmit the virus could be considered as unfit for their job; in these cases, the burden of proof should lie on the employer. Refusal to hire an HIV-positive person or to retain him or her in employment should, in this case, be based on grounds other than the person's state of health. The harshest discrimination to which HIV-positive workers may be subjected occurs at the workplace, among fellow workers who may reject these persons owing to ignorance, prejudice or fear of the illness.[15] This type of discrimination, which is psychologically distressing for the worker who is ostracized, is often based on rumours. In fact, there is a limited risk at the workplace of transmitting the virus through contact with a person with HIV or AIDS except in cases of health-care workers, or others where there may be cuts or other contact that risks transmission of bodily fluids. It is in any case recommended to these workers that they take special precautions in performing their duties.

---

[14] See para. 60 above.

265. In the countries that have added this ground to the prohibited grounds of discrimination laid down in the Convention, it is not lawful to refuse a job to an applicant or to dismiss a worker for the sole reason that he or she is or is suspected of being HIV-positive, unless it can be objectively established in good faith that absence of the infection is a necessary occupational requirement. Another condition on which this may be done is if it is established that the infection would evidently and significantly hamper the performance of the job, which would in effect amount to finding the person unfit for the job for medical reasons. As the Committee pointed out in its General Survey of 1988, "it would appear that the state of health of a person should be taken into account in assessing his or her aptitude for a specific job, although he or she should not be subject to the burden of proving his or her aptitude where the consequences of past or present diseases are concerned" (paragraph 71).

266. Persons with declared AIDS symptoms and a medical prognosis indicating that the disease will hamper the normal, regular performance of the job, or of other duties which might be offered as an alternative, are in a situation comparable to that of those who suffer from any other illness that makes them unfit for a job.

---

[15] See report of the tripartite subregional seminar for the promotion of equality of opportunity and treatment in employment for the French-speaking countries of *Africa, Abidjan*, 26-30 Oct. 1992, p. 17 (only in French).

According to the conclusions of an international colloquy of the Council of Europe: "The right of all workers to safe and healthy working conditions could not be invoked to justify refusing to employ, or dismissing, someone who is HIV-positive (or who refuses to reveal whether he or she is HIV-positive) on the ground that his or her presence constitutes a danger to their fellow workers. Such a measure would not meet the test of necessity". (Seventh International Colloquy on the European Convention on Human Rights, organized by the Secretariat General of the Council of Europe in collaboration with the Danish, Finnish, Norwegian and Swedish Institutes of Human Rights.) (Report on "Equality and non-discrimination: Discrimination arising from disease, in particular against AIDS patients", Copenhagen, Oslo, Lund, 30 May-2 June 1990, H/Coll (90) 5.) In addition, under Recommendation No. R (89) 14, adopted by the Committee of Ministers of the Council of Europe on 24 October 1989, it is recommended that competent authorities of member States take steps so that during employment "employees with any disease or disability, including HIV infection, are treated fairly and with understanding and are allowed to continue working as long as they are able to do so" (paragraph 93).

267. Discriminatory practices in work relations may also arise from legislation in certain countries where access to employment is denied to persons with HIV.[16]

268. As regards national legislation for protection of HIV-positive persons against all forms of discrimination at work, three situations may arise. In regard to the pre-recruitment stage, applicants for a particular job may be requested to undergo screening. The European Court of Justice has ruled that a recruitment medical examination which included a hidden AIDS test without the worker's knowledge was a violation of the tested worker's right to physical integrity and privacy.[17] An employer who suggests that an applicant submit voluntarily to screening, and then questions him or her as to the positive or negative results, or the results of previous testing, may be tempted not to hire an applicant who refuses to cooperate. This constitutes *de facto* discrimination in violation of the fundamental right of each individual to physical integrity and privacy, which amounts indirectly to discrimination based on actual or supposed state of health.

---

[16] For example, on 4 Oct. 1990 the *Russian Federation* adopted legislation whereby any foreigner wishing to stay more than three months in Russian territory to study, travel, or for any other reason must undergo AIDS screening; anyone testing positive will be expelled or denied an entry visa. In *Cuba*, Resolution No. 144 of 11 June 1987 requires that any person wishing to stay in Cuba for more than three months undergo AIDS screening; non-Cubans testing positive are repatriated. Similar provisions regarding foreign nationals have been adopted by *Uzbekistan* under Resolution No. 12 of 17 Nov. 1992, and by the *Republic of Korea*, under Presidential Decree No. 12/872 of 30 Dec. 1989, concerning foreign nationals entering the country for a stay of more than 91 days to engage in professional, sports or artistic activities.

[17] Judgment of 5 Oct. 1994 of the Court of Justice, Case C-404/92 P. Appellant "X" supported by the Union Syndicale-Bruxelles and by the International Federation of Human Rights, and the Commission of the European Communities, para. 28.

South Africa has adopted a national AIDS plan for 1994-95 in conjunction with the National AIDS Committee of South Africa (NACOSA). Besides adopting measures for protecting public health, prevention of transmission of the virus, public education and information, and ensuring the confidentiality of blood testing with informed consent, this plan endeavours to eliminate every form of discriminatory practice in employment linked to the AIDS pandemic. Provision is made for the implementation of a policy of non-discrimination in employment concerning HIV/AIDS, including drafting a code of conduct for employers concerning fair practices in this area, amending legislation to place this practice among the other grounds of discrimination prohibited by law, and providing for a presumption of discrimination in the case of acts committed by an employer against a worker whose HIV status he or she is aware of or suspects.

According to the conclusions of an international colloquy of the Council of Europe, HIV infection leading to neuropsychiatric disorders would not be a sufficient reason for not employing infected persons in sensitive occupations such as train drivers or commercial pilots. Nor, on present evidence, do there appear to be any tenable grounds for restricting the involvement of those who are HIV-positive in the preparation or distribution of food. Exempting health-care workers from equality of opportunity in employment is justified only in exceptional circumstances, in particular when they are consistently negligent in observing routine hygiene precautions or fail to follow medical advice about their work.

Source: *Report on Equality and non-discrimination*, Seventh International Colloquy on the European Convention on Human Rights, Council of Europe, op. cit.)

269. A second situation may arise during employment, when workers known to be HIV-positive are exposed to various forms of discrimination. In *France*, the protection afforded by the Labour Code to all workers from discrimination in employment on the basis of their state of health includes HIV-positive workers. When a worker is known to be HIV-positive and is pronounced unfit for his or her job by a physician, the employer must attempt to find alternative employment for the worker, taking into account the physician's written report and suggestions as to the worker's fitness to perform another job in the enterprise that is as comparable as possible to the worker's previous job.[18] However, termination of employment on the ground of the worker's illness is not deemed to be wrongful dismissal when the worker's absences exceed a certain duration and hamper the proper operation of the enterprise.[19]

270. The third such situation may arise at any time, either before or during employment, if a worker's HIV status is not known and he or she does not wish to be tested. Laws in some States provide that the employer cannot force the worker to undergo tests. Routine medical examinations which include testing for HIV status without the worker's knowledge must not be used to determine a worker's HIV status. A justifiable exception to this rule has been adopted in *France* where the Labour Code stipulates that the purpose of these examinations can only be "to determine whether the employee is suffering from an illness that endangers other workers".[20] Furthermore, except when the retention of a worker in his or her job poses an immediate threat to his or her safety or that of third parties, the works physician cannot declare the worker unfit for the job until after an assessment has been made of the job and conditions of work in the enterprise, and the worker concerned has undergone two medical examinations two weeks apart.[21] Recommendation No. R (89) 14 of the Committee of Ministers of the Council of Europe (see box above) on the ethical issues of HIV infection in the health care and social settings calls on member States to take measures to protect workers against all discrimination on this ground, in particular by ensuring that occupational health service professionals are in no way required by the employer to test workers for HIV. The Recommendation provides for these professionals to respect the confidentiality of any worker who may inform them that he or she is HIV-positive; and that in no case will this condition lead to a reassessment of the worker's fitness for the job (unless there is a risk that the worker will be exposed to factors in the workplace that are potentially hazardous to his or her health). It is therefore recommended that health data be processed and filed only by authorized personnel bound by medical confidentiality.

---

[18] ss. L.241-10-1 and L.122-24-4 of the Labour Code.

[19] ibid., s. L.122-14-3.

271. In the Committee's opinion, efforts to eliminate all discrimination based on state of health, and on HIV/AIDS in particular, should be carried out as part of the national policy to promote equality of opportunity and treatment. Workers' organizations in many countries report frequent discriminatory practices against persons with HIV. In *Spain*, the General Union of Workers has pointed out that HIV-positive workers are discriminated against through dismissal or non-renewal of their contracts of employment, and that in some enterprises HIV screening is carried out without the workers' knowledge or consent.[22] Although persons with HIV are protected under article 14 of the Constitution, which sets forth the general principle of equality under the law, and section 4(2)(c) of the Workers' Charter, which prohibits all discrimination based on a physical, mental or sensory disability if the worker has the necessary skills to perform the task or hold the post in question, the Committee feels this may not suffice to ensure that the principle laid down in the Convention is applied to these workers.

---

[20] ibid., s. R.241-48.

[21] ibid., s. R.241-51-1.

[22] Observation of the Committee concerning application of Convention No. 111 by Spain, 1993 Report, pp. 367-368.

272. In *Canada*, HIV/AIDS policy applicable to all employees of the public service provides that HIV testing is not a condition of employment and that all government records containing HIV/AIDS-related data of a personal nature must be protected and handled in accordance with the Privacy Act. In addition, Canadian courts have ruled that HIV/AIDS infection cannot be used as an automatic ground for dismissal, and that HIV and AIDS have been recognized as disabilities under the Canadian Human Rights Act, the Canadian Charter of Rights and Freedoms and relevant provincial legislation, despite the fact that this is not expressly stated in any of these texts.[23] In 1993, the Department of Justice and Health Canada established an Interdepartmental Committee on Human Rights and AIDS, whose mandate is not limited to employment issues but also includes examining HIV/AIDS-related matters at the workplace. In the public service of Canada, employees with HIV or AIDS are not considered as posing a health risk to others in most work environments. Moreover, employees with HIV/AIDS are encouraged to remain productive as long as they are able. Private sector employers must also take reasonable steps, short of imposing undue hardship on those not affected by the virus, to accommodate HIV-positive employees at work.[24] In *New Zealand*, the Human Rights Act provides for the same type of anti-discriminatory measures.

(3) Sexual orientation

273. The Committee notes that member States are increasingly adopting legislative measures specifically protecting workers who are vulnerable to discrimination on the basis of their sexual orientation. This criterion is not provided for specifically in the Convention, although some States have determined that the criterion of sex includes sexual orientation. The evolution that has taken place since the Convention's adoption in 1958 means that this criterion has to be examined.

274. Discrimination based on sexual orientation is an extremely broad concept closely linked to lifestyle, and affects not only sexual minorities. Heterosexuals may also suffer discrimination on this basis by persons belonging to sexual minorities.

275. Certain national and state constitutions expressly prohibit discrimination based on sexual orientation. For example, the Interim Constitution of *South Africa* stipulates that no person shall be unfairly discriminated against, directly or indirectly and, without derogating in any way from the generality of this provision, on the ground of sexual orientation. In *Germany*, both the Brandenburg Constitution[25] and the new Thuringia Constitution, adopted after a popular referendum in 1994, provide for protection against all discrimination based on sexual orientation.

---

[23] *Thwaites* v. *Canada* (Armed Forces), 1993, 19 CHRR D/259, Canadian Human Rights Tribunal.

[24] Report by the Government of Canada on the application of the Convention.

[25] Article 12, *Gesetz- und Verordnungsblatt für das Land Brandenburg*, 1992, No. 18.

The legislation of the State of Minnesota in the *United States* has defined the concept of sexual orientation as follows: "Sexual orientation means having or being perceived as having an emotional, physical or sexual attachment to another person without regard to the sex of that person, or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." (United States, Minn. Sta. Sec. 363.01 (45), 1993). In other words, the prohibition of all discrimination based on sexual orientation should be broadly defined to include male and female homosexuals, bisexuals and heterosexuals, as well as transsexuals and transvestites. Legislation in two states of the United States, Massachusetts and Minnesota, stipulates that the prohibition of all discrimination "shall not include persons whose sexual orientation involves minor children as the sex object".

Source: United States, Mass. Gen. Laws. Ann. Ch. 151B, Sec. 4, 1989.

276. In countries where discrimination based on sexual orientation is not expressly prohibited by the legislation in force, national courts have sometimes bridged the gap by giving a broad interpretation to the principle of equality of treatment laid down in constitutions or human rights legislation so as to include the prohibition of this type of discrimination. In *Canada*, provincial tribunals have confirmed the position taken by the Federal Department of Justice according to which the Canadian Human Rights Act should be interpreted and applied as expressly prohibiting all discrimination based on sexual orientation among the grounds contained in section 3 of this Act. In a recent case,[26] the Canadian Supreme Court also ruled that sexual orientation was a prohibited ground of discrimination under section 15 of the Canadian Charter of Rights and Freedoms, under which every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on a number of criteria — race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. As part of the revision of Canadian human rights legislation it is planned to add sexual orientation to the list of prohibited grounds of discrimination.[27]

---

[26] *Egan* v. *Canada*, 25 May 1995.

[27] When it was revised in 1992, the Human Rights Act of the Province of *New Brunswick* added sexual orientation to the list of prohibited grounds of discrimination in all areas of application of this legislation. In *Saskatchewan*, the Human Rights Code has been amended to include protection against discrimination based on sexual orientation; other Canadian provinces also expressly prohibit sexual orientation as a ground of discrimination: *Manitoba, Nova Scotia, Ontario, Quebec, British Columbia* and the *Yukon Territory*.

277. To ensure specific protection against all discrimination based on sexual orientation, this ground should be expressly included in national legislation, as is the case in *New Zealand*,[28] *France* (with reference to a person's lifestyle, rather than sexual orientation)[29] and *Denmark*, where discrimination based on sexual orientation is prohibited.[30] In the *Netherlands*, the legislation has strengthened penal sanctions,[31] inter alia, against public acts of hatred or discrimination on grounds of sexual orientation, as well as personal acts of discrimination in a person's exercise of office, profession or business on grounds of homosexual or heterosexual inclination. In *Finland*, the current debate on reform of the Penal Code also includes the possibility of making discrimination by an employer against a jobseeker or worker, inter alia, on the basis of sexual orientation, a punishable offence. In *Australia*, the Industrial Relations Act[32] expressly mentions the need to prevent and eliminate discrimination on the basis of sexual preference (section 3(g)). It also provides for the re-examination of all arbitration decisions every three years (section 150A); if such a decision contains a provision that discriminates against an employee on the basis of sexual preference, or for reasons including same, the Labour Relations Committee must remedy this situation. Australian federal legislation of 1986[33] empowers the Human Rights and Equal Opportunity Commission to investigate and rule on cases of discrimination in employment and occupation on the basis of sexual preference. In the *United States*, draft legislation on non-discrimination in employment of 1994[34] would make unlawful any discrimination based on sexual orientation in the form of termination, demotion, denial of promotion, harassment or cuts in pay or work hours. It should be noted[35] that in the United States male and female homosexuals and bisexuals are not recognized as "suspect classes", i.e. as readily exposed to discrimination.[36] There are three criteria used by the courts to determine if a group of persons should be placed in this category: first, the history of discrimination against the group; second,

[28] s. 22 of the Human Rights Act of 1994.

[29] s. 416 of the Penal Code provides that "anyone who refuses to hire or who dismisses a person on the basis of his or her lifestyle, or who makes his or her lifestyle a condition of employment, shall be punished with imprisonment and a fine"; s. L. 122-45 of the Labour Code provides that "no one may be excluded from recruitment, nor may any worker be sanctioned or dismissed, by reason of his or her lifestyle".

[30] Act No. 289 (as amended on 1 July 1987), and s. 266b of the Penal Code.

[31] Act No. 623 of 14 Nov. 1991 to amend the Criminal Code.

[32] Industrial Relations Act, 1988, as amended by the Industrial Relations Reform Act, No. 98 of 1993.

[33] Federal Human Rights and Equal Opportunity Commission Act.

[34] Employment Non-Discrimination Bill of 1994.

[35] See James D. Wilets: "International human rights law and sexual orientation", in *Hastings International and Comparative Law Review*, Vol. 18, No. 1, Fall 1994.

[36] *High Tech Gays* v. *Defense Industry Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), and *Ben-Shalom* v. *Marsh* 881 F.2d 454, 464 (7th Cir. 1989).

the "invidiousness" of that discrimination (unjustified in the sense of being based upon stereotypes and characteristics that are immutable and irrelevant for the purpose against which the class is being discriminated); and third, the "powerlessness" of the group (the ability of the group in question to pursue its rights in the political rather than judicial arena).[37]

In its Recommendation No. 924 (1981) on discrimination against homosexuals, the Parliamentary Assembly of the Council of Europe stated the following:

> "2. Observing that, despite some efforts and new legislation in recent years directed towards eliminating discrimination against homosexuals, they continue to suffer from discrimination and even, at times, from oppression;
>
> 3. Believing that, in the pluralistic societies of today, in which of course traditional family life has its own place and value, practices such as the exclusion of persons on the grounds of their sexual preferences from certain jobs, the existence of acts of aggression against them or the keeping of records on those persons, are survivals of several centuries of prejudice;
>
> 4. Considering that in a few member States homosexual acts are still a criminal offence and often carry severe penalties;
>
> 5. Believing that all individuals, male or female, having attained the legal age of consent provided by the law of the country they live in, and who are capable of valid personal consent, should enjoy the right to sexual self-determination; ...
>
> 7. Recommends that the Committee of Ministers:
>
> (i) urge those member States where homosexual acts between consenting adults are liable to criminal prosecution, to abolish those laws and practices; ...
>
> (ii) call on the governments of the member States:
>
> (a) to order the destruction of existing special records on homosexuals and to abolish the practice of keeping records on homosexuals by the police or any other authority;
>
> (b) to assure equality of treatment, no more no less, for homosexuals with regard to employment, pay and job security, particularly in the public sector;
>
> (c) to ask for the cessation of all compulsory medical action or research designed to alter the sexual orientation of adults."

Source: Parliamentary Assembly of the Council of Europe, Thirty-third Ordinary Session, Recommendation 924 (1981) on discrimination against homosexuals, adopted by the Assembly on 1 Oct. 1981, 10th Sitting.

---

[37] *Evans* v. *Romer*, 854 P.2d 1270, 1275 (Colo. 1993); *Yick Wo* v. *Hopkins*, 118 US 356, 369 (1886); and *Adarand Constructors, Inc.* v. *Federico Pena, Secretary of Transportation et al.*, Supreme Court, No. 93-1841 of 12 June 1995.

CHAPTER 4

Policies and action programmes affording effective remedies for discriminatory practices

278. The Committee has already emphasized that, while affirmation in legislation of the principle of equality may be an element of national policy aimed at equality of opportunity and treatment in employment, it cannot by itself constitute a policy within the meaning of Article 2 of the Convention. Nor is the incorporation of the Convention in internal law by virtue of ratification sufficient to ensure its application in law and in practice.[1]

279. The national policy adopted in accordance with the Convention must be implemented by pursuing this policy both directly, by ensuring its observance in services and employment under the control of a national authority, and indirectly, by taking measures to secure its acceptance in other sectors.[2] In order to apply the Convention it is not sufficient to prohibit all kinds of discrimination, either by national legislation or by any other means; specific action must also be taken at the national level to help promote the essential conditions for all workers to benefit in practice from equality in employment and occupation. The national policy must be clearly expressed, which means that programmes must be established for this purpose; it must also be applied, which means that the State concerned must take appropriate measures. These measures must encompass both the public and the private sectors.

280. The Committee recalls that its General Survey of 1988 noted a substantial change in focus in the policy of equality of opportunity and treatment, which has broadened from an essentially standard-setting approach to embrace economic and social measures. At first, standard-setting mechanisms to eliminate discrimination were guided by the general principle of equality, which subsequently became more specific and incorporated equality in employment and occupation.[3] At a second stage, this movement for equality of opportunity gave rise to the definition and implementation of positive action programmes. Once it had been acknowledged that an individual was entitled to equality of treatment irrespective of his or her race, sex or national extraction, efforts focused on changing practices throughout society, and especially within

[1] General Survey of 1988, para. 159.

[2] ibid., para. 157.

[3] ibid., para. 163.

the enterprise.[4] In most cases, inequality in employment results from the fact that several categories of the population remain unaffected by improvements in job prospects or training from which other categories have benefited. The positive action programmes which have been developed as a corollary to efforts by some countries to improve their application of the Convention, rely upon economic and social policy as a whole and extend far beyond the legal framework and regulations establishing them. The following examples illustrate different forms of positive action adopted to this end.

281. In *Australia* the National Training Authority (ANTA), which is responsible for enhancing individual access to vocational training and opportunities on the labour market, through the application of national action plans concerned with vocational training and education, became operational at the beginning of 1994. Furthermore, a specific programme known as the Equity Strategy for the Australian Vocational Certificate Training System has been launched to promote equal opportunity in training and employment through guidelines for the equitable provision of training, in particular to disadvantaged groups.

282. In *Iceland*, Parliament adopted a four-year plan of action (1993-97) in May 1993 to establish equality between women and men, and positive measures were taken to promote equal opportunity and treatment between the sexes in rural areas. In *Italy*, under the Act providing for affirmative action to achieve equal treatment for men and women in employment,[5] affirmative action programmes may be presented by the enterprises concerned for approval by the National Committee for the Application of the Principle of Equal Opportunity and Treatment for Men and Women in Employment. This procedure allows enterprises to obtain a number of tax and financial benefits. Similar measures exist to promote the creation of enterprises by women. The Act on Affirmative Action for Women in Entrepreneurial Activity (No. 215 of 25 February 1992) promotes the creation of enterprises staffed and managed predominantly by women.

283. In *New Zealand* the Government has adopted a twofold approach to promoting equality of treatment in the private sector. On the one hand, it considers that legislation must be established to prohibit any form of discrimination not only in the sectors under its direct control but also in the private sector, and that victims of such discrimination should be given appropriate means of appeal against discriminatory situations. It also believes that equality of opportunity and treatment is best achieved in an environment in which the legislative protection of employees who are at a disadvantage on the labour market is complemented by an active promotional and educational campaign highlighting the benefits for New Zealand business of an employment policy which respects equality of opportunity and treatment. In the public sector, it is the responsibility of directors of public departments to be "good employers", i.e. to pursue a personnel policy which offers fair and proper treatment of employees in all aspects of their employment. This is to be done in particular through the establishment of good and safe working conditions, the preparation of a programme of equal opportunity in employment, and the recognition of the aims and aspirations of the Maoris and other ethnic groups and of the employment requirements of women and disabled persons. Solutions such as the granting of temporary wage subsidies by the Government to employers who recruit jobseekers from underprivileged groups may have positive effects, as can be seen from the "Job Plus" programme introduced to help such persons to obtain permanent, full-time employment. According to the Government, almost 23,000 jobseekers (including 5,713 Maoris and 6,387 women, of a total of 120,000 unemployed) found a full-time job through this programme between July 1994 and June 1995. An evaluation of the programme completed in March 1994 found that for a substantial number of disadvantaged people, the "Job Plus" programme facilitated participation in unsubsidized work.

---

[4] ibid., para. 164.

[5] Acts Nos. 125 of 10 Apr. 1991 and 215 of 25 Feb. 1992.

284. In the *Netherlands*, following the adoption by Parliament of proposals to increase the number of women in government service, a progress report was issued on 31 December 1990. The conclusions of this evaluation showed that affirmative action programmes may make a substantial contribution to the achievement of the goals of equality, and it was decided to adopt a programme for the period 1991-95 to increase further the participation of women in government bodies and achieve a more balanced distribution between men and women at all levels. A follow-up policy was introduced in this sector and an information centre set up in the Ministry of Home Affairs to explain and advise on these programmes. In the measures that have been taken, emphasis has been placed on recruitment as well as promotion, and positive results have been achieved in the number of women in government service at all levels (an increase of around 25 per cent throughout the period).

285. In *Uruguay* the National Action Plan for Women and the Family (1992-97) provides for programmes to review labour legislation in order to identify and eliminate provisions which are directly or indirectly discriminatory, as well as positive measures to increase training and employment opportunities for women. "Horizontal programmes" aimed at vulnerable categories of women workers, such as rural women, have accordingly been devised.

286. The Committee emphasizes that in order to ensure effective promotion of the principle of equality in employment and occupation, attitudes and behaviour also need to be modified and account should be taken of the right of all persons to equal opportunity and treatment. It believes that these examples of positive action, which rely more on promotional measures, may be as effective in helping to achieve equal opportunity and treatment as systems of quotas or preferences (whether for women, disabled persons or ethnic or social minorities), which sometimes tend to be imposed solutions.

287. In this connection Recommendation No. 111 emphasizes the importance of informing and educating the public. One means to this end is the enhancement of public awareness not only of the provisions contained in the

Convention but also of identification of discriminatory situations, so that they can be eliminated. For example, information publications may set in motion a process which ensures the dissemination and respect of the principles of the Convention in working life.

Affirmative action measures, sometimes called positive discrimination, are often extremely useful in the first stages of eliminating discrimination and the achievement of real equality. The term "affirmative action" originated in the *United States*, following the enactment of its main anti-discrimination legislation in 1964. If courts had limited themselves to awarding the traditional remedies (reinstatement with back pay or damages) to victims of discrimination, progress might have been so slow as to be imperceptible. Such remedies were viewed as inadequate in combating the underlying problem: entrenched racially or sexually stratified workplaces. Directing employers to take positive action to change certain personnel practices, for instance, to open up previously segregated job ladders, appeared to be a more efficient response.

Various forms of affirmative action have been used in the United States. For instance, women and other disadvantaged groups have been given preference in training programmes, when bidding for jobs, and in being awarded government contracts. Companies that do business with the federal Government were required to have a workforce that roughly mirrored the composition of the population qualified to perform the jobs involved.

The affirmative action approach of according preference based on differences generates a tension between the goal of protecting the opportunities of all individuals and the desire to ensure the advancement of women and members of minority groups. This tension has not been resolved to the satisfaction of all, as the claims of "reverse discrimination" indicate. The Supreme Court of the United States has found some kinds of affirmative action unlawful, particularly where the State as employer or contractor is giving a preference, but it is clear that the use of affirmative action orders led to rapid change on a large scale at the workplace. Action has now moved to a second stage, with government-mandated affirmative action having served as a catalyst to spur private sector employers to undertake voluntary measures to improve the position of women and minorities. Now that diverse workforces are the norm within companies, employers are focusing on improving the interaction at work between persons from diverse backgrounds.

288. In a decision of 17 October 1995,[6] the European Court of Justice in Luxembourg considered that the provisions of section 2 of Directive 76/207/EEC (adopted on 9 February 1976 by the Council of Ministers of the European Communities, on the implementation of the principle of equal treatment for men and women in employment) were inconsistent with regulations applied in a case submitted to it, and that article 2 (paragraphs 1 and 4) of the

---

[6] Judgment of the Court in case C-450/93 concerning a Reference to the Court under Article 177 of the EEC Treaty by the Bundesarbeitsgericht (Federal Labour Court) for a preliminary ruling in the proceedings pending before that Court between Mr. Eckhard Kalanke and Freie Hansestadt Bremen (City of Bremen).

Directive: "precludes national rules such as those in the present case which, where candidates of different sexes short-listed for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart."[7] This decision has elicited various reactions and discussions in the European Parliament, since positive action is recognized as being necessary to correct imbalances in sectors where women are under-represented. While this decision makes it clear that automatic and rigid quotas are not permissible under the Directive, the Court's prior support for affirmative action indicates that flexible approaches may still be possible.

289. The adoption of an affirmative action programme stems from the observation that the banning of discrimination is not in itself enough to eliminate it in actual practice. The Committee recalls[8] that the concept of "positive action programmes" encompasses measures which set out to eliminate and make good any de facto inequalities, by enabling members of groups suffering from discrimination to enjoy comparable opportunities for education and training and the means to participate on an equal footing in occupational life in all sectors of activity and occupations and at all levels of responsibility. Like the special measures of protection or assistance (Article 5 of the Convention), which are not considered as discrimination because they seek to protect certain vulnerable groups, the concept of "affirmative action" views these measures as the means to promote equality of opportunity of certain social groups which are subject to recognized discrimination, and which are applicable as long as the target social groups are not in a position to exercise their rights to equality in practice. There are various forms of affirmative action within the framework of the national policy designed to promote equality as prescribed by Article 2 of the Convention, which each member State may decide on in the light of its own needs and national conditions.

---

[7] The Directive of the Council of Ministers of the European Communities of 9 Feb. 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions provides:

Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

...

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in article 1(1).

[8] See General Survey, 1988, paras. 164 and 166.

CONCLUSIONS

Fundamental importance of the Convention

290. Although Convention No. 111, with 120 ratifications, is one of the ILO instruments which has been ratified by the largest number of countries, 53 members States of the ILO (including two new Members) have not yet ratified it. However, it is encouraging to note that almost all States have included anti-discriminatory provisions in their national legislation or constitution and that several of them have stated their intention to ratify the Convention or to study it with a view to ratification.

291. Although it is widely recognized that each individual has the right to equal opportunity and treatment in employment and that it is unjustifiable to restrict this right in any way whatsoever because of personal characteristics of the individual which have no bearing on his or her employment, there is still a certain amount of reticence in this sphere, and outdated attitudes often persist. Some States still hesitate to ratify a Convention which, although offering considerable flexibility, deals with a subject often considered sensitive and which has political, socio-cultural and even economic implications. No country, however advanced in this respect, can boast of having achieved full equality in employment. The subject is constantly evolving; furthermore, the extent and complexity of the problems involved in discrimination increase the difficulties of application, in particular regarding the effectiveness of a national policy to promote equal opportunity and treatment. When a country has succeeded, through its legislation and a policy to promote equality, in eliminating discriminatory factors, others are likely to emerge and give rise to further difficulties.

292. Race and colour, national extraction, religion, social origin and political opinion are decisive grounds of discrimination when society is in the throes of political and economic upheaval and transformation. Sex is another ground which is perceived differently as society evolves, and is strongly influenced by traditions and religious beliefs. During the preparatory work for the Convention, the world generally was experiencing a period of economic growth; it was considered at that time that "the achievement and maintenance of full employment are therefore one of the greatest contributions which can be made towards equality of employment and opportunity".[1] This is still the case today, although the perspective has changed. The world is now confronting widespread unemployment and economic changes, and even recession, which are marginalizing the least advanced countries and creating social tension in many countries. In this context, some ground has been lost in the attainment of non-discrimination, and new forms of inequality have been identified. For example, socio-economic gaps are widening in the countries moving towards a market economy. Levels of unemployment of ethnic minorities in some countries have soared abruptly above the average; women and disabled workers, in particular, are adversely affected by new labour market trends and young persons and older workers by long-term unemployment and economic restructuring. A report by the Director-General of the ILO points out that "the growth of transnational production has undermined the effectiveness of traditional instruments of labour policy and of collective bargaining" and "the debasement of labour standards ... needs to be countered by giving a fresh impetus to international cooperation to enforce basic labour standards".[2] During periods of economic recession, women in particular, but also minorities and other disadvantaged groups, encounter greater difficulties on the labour market than others, and if they are disabled they may expect to meet even more serious obstacles. Fewer available jobs means greater competition between individuals, which makes it even more important to ensure the observance of the principles of non-discrimination and to adopt positive measures.

---

[1] Report VII(1), ILC, 40th Session, 1957, p. 29.

293. The Committee therefore calls on member States which have not yet done so to ratify the Convention, and on those which have made it part of their international obligations to do everything possible to apply its principles in both letter and spirit.

Suggestions for broadening the protection provided by the Convention

294. The changing nature of discrimination and of the promotion of employment has led the Committee to wonder whether it might not be appropriate to examine the possibility of including, in an additional protocol open to specific ratification, grounds of discrimination that are not already contained in Article 1 of the Convention for various reasons. This would harmonize Convention No. 111 with other ILO standards and with other international human rights instruments. The elaboration of an additional Protocol would also allow account to be taken, almost 40 years after the adoption of this instrument, of changes which have taken place in this field and which are reflected in national law.

295. The Convention already provides, in Article 1(1)(b), that "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with workers' and employers' organizations, where such exist, and with any other appropriate bodies" may be added to the grounds listed in Article 1(1)(a). Nevertheless, no formal declarations have been made in this sense in the nearly 40 years since the Convention was adopted, although a number of other such grounds are found in national legislation. In such cases, the Committee has taken note of these additional grounds in supervising the application of the Convention.

---

[2] See Report of the Director-General, "Promoting employment", ILC, 1995, p. 102; see also pp. 56 and 57.

296. Other prohibited grounds of discrimination are also included, as already indicated, in other international labour standards, and in other international human rights treaties such as the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights, and the European Convention on Human Rights. Convention No. 111, which is the ILO's principal instrument for setting a policy of non-discrimination, is thus sometimes of narrower scope than national laws and practice, and sometimes does not have as wide a coverage as other Conventions.

297. On the basis of standards contained in other international instruments and those emerging from national practice, the Committee recommends that the Governing Body and the International Labour Conference consider that an additional Protocol might include some or all of the following criteria (listed in alphabetical order): age, disability, family responsibilities, language, matrimonial status, nationality, property, sexual orientation, state of health and trade union affiliation. The contents of the list would, of course, have to be examined by the Governing Body and the Conference. The Committee believes that two alternative approaches should be explored. The first would consist of adopting a list of possible additional criteria, and allowing States to accept one or more as they choose. The second approach would be to include in the protocol a "hard core" of additional criteria which would have to be accepted on ratification of the protocol, with a list of other criteria which could be accepted one by one. Both approaches merit examination.

298. The Committee proposes also to include a second element in the Protocol which would require ratifying States, in cases of discrimination, to place the burden on the person against whom discrimination is alleged to prove that the disadvantageous treatment was not based on any of the prohibited grounds, where the complaint has produced plausible or prima facie evidence of discrimination. The Committee considers that there are great advantages in doing this because of the substantial difficulty of proving discriminatory practices, which the Committee has noted above (see paragraphs 29 and 230).

299. The purpose of including new grounds in a protocol to the Convention would be to pave the way for and foster awareness of additional measures which might be adopted to combat discrimination in employment and occupation. The optional nature of such a protocol would preserve the current framework of the Convention and would not place additional obligations on member States other than those to which they have already voluntarily subscribed.

300. The Committee would suggest that it should be possible to adhere to such a protocol at any point after ratification, or at the same time the Convention was ratified, but that adherence to the protocol would not be compulsory for ratification of the Convention itself. In making this proposal, the Committee does not recommend that the discussion should be reopened on Convention No. 111 as it now stands. Since its adoption in 1958, this instrument has, in fact, served well the principles of elimination of discrimination and protection of equality. Nor does the Committee suggest weakening of the protection it offers, but rather to reaffirm the goals which it sets forth, and to move toward their more complete realization.

301. The Committee recalls in this connection that, in its 1985 General Survey on labour inspection, it recommended that consideration be given to the adoption of a protocol on the Labour Inspection Convention, 1947 (No. 81), in order to extend the application of the Convention to other sectors. It is glad to see that such a protocol was adopted by the Conference at its 82nd (1995) Session, in the sense recommended by the Committee in 1985.

302. Furthermore, the Committee requests governments which have ratified the Convention to indicate from time to time their position concerning the application of Article 1(1)(b) of the Convention, and to indicate the criteria not covered by paragraph (1)(a) of this Article which would extend the application of the Convention. The Committee therefore proposes to include in its future comments a request in this connection in appropriate cases, particularly to States which have included in their legislation one or more criteria in addition to those specifically provided for by paragraph 1(a) of Article 1 of the Convention.

The need for continuous action

303. The Committee would like to emphasize that over the 37 years of its existence, Convention No. 111 has demonstrated its pioneering role in the elimination of discrimination and the promotion of equality. The provisions of the accompanying Recommendation may serve as very useful guidelines in the formulation of national policy, as can be seen in many countries which have adopted legislation in conformity with the Convention. Most countries have also drawn up and implemented a policy of equality in line with the 1958 instruments adapted to national circumstances and sometimes displaying considerable ingenuity in the search for solutions to problems. The Committee expresses appreciation and support for the countries which have made continuing efforts to implement the principles of the Convention. Such determination to uphold important principles of human rights should be a source of encouragement and act as a catalyst for all of the ILO's constituents to follow.

304. As regards countries which have not yet ratified the Convention, the Committee recalls that ratification should not be considered as an end in itself but as a means of improving the social and labour situation of the ratifying country. The impediments to implementation of anti-discrimination measures resulting from an unfavourable economic climate are not insurmountable and several types of specific measures may be envisaged, both at the national level and within the framework of cooperation with the ILO.

The need for a general context of equality

305. The Committee is convinced of the virtues of social dialogue based on tripartism in the preparation of programmes to redress inequalities, and sometimes even exclusions, in an effective and consistent manner. If the fight against discrimination and the promotion of equality are pursued collectively within an already proven homogeneous framework, the chances of strengthening social justice will be all the greater. The Committee recalls that equality in employment can be fully achieved only within a general context of equality. It believes that a general context of equality will depend on two conditions being met: respect for the rule of law and the development of a climate of tolerance. Constant attention should therefore be given to the need for continuous action adapted to changing attitudes and social behaviour. The objectives to be achieved by the formulation and application of a national policy to promote equality should be defined and regularly evaluated at the national level.

Promotional activities

306. The Committee recalls that when the Convention was adopted in 1958, it was pointed out that "the abolition of discrimination among workers is one of the major problems for the political, social and cultural future of mankind" and that "the accomplishment of equality among workers ... is one of the great goals to which all ideas of justice and social progress tend".[3] The Committee considers that there is a need for strengthening measures to educate and inform the public on such a crucial subject. It is indispensable to develop the available sources of information on instances of direct or indirect discrimination based on such grounds as those set forth in the Convention, if significant progress is to be achieved in eliminating discrimination and promoting equal opportunity and treatment.

307. Since much remains to be done in this sphere, and because all workers may in one way or another be the victim of discrimination at work, the Committee emphasizes the importance of developing promotional activities and ILO assistance. Tripartite training seminars could be further developed at the national or regional levels. The Office can also respond to requests for assistance on the implementation of the Convention, as it recently did for Brazil, for instance. Furthermore, in order to promote greater awareness of the problems of discrimination and the ways in which they could be tackled with a view to establishing equality of opportunity and treatment, it would be advisable to review the Draft Guide of Practice for Equal Opportunity and Treatment in Employment drawn up in 1985.

---

[3] Report of the Committee on Discrimination, *Record of Proceedings*, ILC, 42nd Session, 1958, p. 402.

308. The Committee welcomes the fact that in most member States aspects of problems related to discrimination and the promotion of equality are the subject of debate and positive measures. However, too many situations give rise to serious conflicts, and even wars, based on discriminatory concepts, which reflect an alarming social regression that might, if unchecked, be perpetuated in the future. In general, the forms of inequality which exist today are not the result of legislation but of de facto situations and relationships between people in practice. The action envisaged by the Convention and the Recommendation is therefore not limited to the elimination of arbitrary individual acts motivated by prejudice or intolerance; it is not enough to remove the obstacles in the way of equality to ensure that the latter is achieved in practice. Positive action for the promotion of equal opportunity and treatment must be pursued in actual practice and become part of social reality so that society as a whole can reflect on the efforts being made by the ILO in the world of work and can adhere voluntarily to its principles.

APPENDIX I

List of the 52 ILO member States which have been asked to submit reports on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

(Article 19 of the Constitution)

Member States	Report received	Report not received
Albania		X
Bahamas	X	
Bahrain	X	
Belize	X	
Botswana	X	
Cambodia		X
China	X	
Comoros		X
Congo		X
Djibouti		X
El Salvador	X	
Equatorial Guinea		X
Eritrea		X
Estonia	X	
Fiji		X
Georgia		X
Grenada		X
Indonesia		X
Ireland	X	
Japan	X	
Kazakhstan		X
Kenya	X	
Korea, Republic of	X	

Member States	Report received	Report not received
Lao People's Democratic Republic	X	
Lesotho		X
Luxembourg	X	
Malaysia	X	
Mauritius	X	
Moldova, Republic of		X
Myanmar	X	
Namibia	X	
Nigeria		X
Oman		X
Papua New Guinea		X
Seychelles		X
Singapore		X
Solomon Islands		X
South Africa	X	
Sri Lanka	X	
Suriname	X	
Tanzania, United Republic of	X	
Thailand	X	
The former Yugoslav Republic of Macedonia		X
Turkmenistan		X
Uganda	X	
United Arab Emirates	X	
United Kingdom	X	
United States	X	
Uzbekistan	X	
Viet Nam	X	
Zaire	X	
Zimbabwe		X
TOTAL	**29**	**23**

Note: In addition a total of 11 reports have been received, under article 19 of the Constitution, in respect of the following non-metropolitan territories: **United Kingdom** (Anguilla, Bermuda, British Virgin Islands, Falkland Islands (Malvinas), Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Montserrat, St. Helena).

APPENDIX II

Ratifications of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Date of entry into force: 15.06.1960

States	Ratification registered
Afghanistan	01.10.69
Algeria	12.06.69
Angola	04.06.76
Antigua and Barbuda	02.02.83
Argentina	18.06.68
Armenia	29.07.94
Australia	15.06.73
Austria	10.01.73
Azerbaijan	19.05.92
Bangladesh	22.06.72
Barbados	14.10.74
Belarus, Republic of	04.08.61
Belgium	22.03.77
Benin	22.05.61
Bolivia	31.01.77
Bosnia and Herzegovina	02.06.93
Brazil	26.11.65
Bulgaria	22.07.60
Burkina Faso	16.04.62
Burundi	25.06.93
Cameroon	13.05.88
Canada	26.11.64
Cape Verde	03.04.79
Central African Republic	09.06.64
Chad	29.03.66
Chile	20.09.71
Colombia	04.03.69
Costa Rica	01.03.62
Côte d'Ivoire	05.05.61
Croatia	08.10.91
Cuba	26.08.65
Cyprus	02.02.68
Czech Republic	01.01.93
Denmark	22.06.60
Dominica	28.02.83
Dominican Republic	13.07.64
Ecuador	10.07.62
Egypt	10.05.60
El Salvador	15.06.95
Ethiopia	11.06.66
Finland	23.04.70
France	28.05.81
Gabon	29.05.61
Germany	15.06.61
Ghana	04.04.61
Greece	07.05.84
Guatemala	11.10.60
Guinea	01.09.60
Guinea-Bissau	21.02.77
Guyana	13.06.75
Haiti	09.11.76
Honduras	20.06.60

States	Ratification registered	States	Ratification registered
Hungary	20.06.61	Philippines	17.11.60
Iceland	29.07.63	Poland	30.05.61
India	03.06.60	Portugal	19.11.59
Iran, Islamic Republic of	30.06.64	Qatar	18.08.76
Iraq	15.06.59	Romania	06.06.73
Israel	12.01.59	Russian Federation	04.05.61
Italy	12.08.63	Rwanda	02.02.81
Jamaica	10.01.75	Saint Lucia	18.08.83
Jordan	04.07.63	San Marino	19.12.86
Kuwait	01.12.66	Sao Tome and Principe	01.06.82
Kyrgyzstan	31.03.92	Saudi Arabia	15.06.78
Latvia	27.01.92	Senegal	13.11.67
Lebanon	01.06.77	Sierra Leone	14.10.66
Liberia	22.07.59	Slovakia	01.01.93
Libyan Arab Jamahiriya	13.06.61	Slovenia	29.05.92
Lithuania	26.09.94	Somalia	08.12.61
Madagascar	11.08.61	Spain	06.11.67
Malawi	22.03.65	Sudan	22.10.70
Mali	02.03.64	Swaziland	05.06.81
Malta	01.07.68	Sweden	20.06.62
Mauritania	08.11.63	Switzerland	13.07.61
Mexico	11.09.61	Syrian Arab Republic	10.05.60
Mongolia	03.06.69	Tajikistan	26.11.93
Morocco	27.03.63	Togo	08.11.83
Mozambique	06.06.77	Trinidad and Tobago	26.11.70
Nepal	19.09.74	Tunisia	14.09.59
Netherlands	15.03.73	Turkey	19.07.67
New Zealand	03.06.83	Ukraine	04.08.6
Nicaragua	31.10.67	Uruguay	16.11.89
Niger	23.03.62	Venezuela	03.06.7
Norway	24.09.59	Yemen	22.08.6
Pakistan	24.01.61	Yugoslavia	02.02.6
Panama	16.05.66	Zambia	23.10.7
Paraguay	10.07.67		
Peru	10.08.70	Total number of ratifications:	120

APPENDIX III

Text of the substantive provisions of the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958

Convention No. 111

Article 1

1. For the purpose of this Convention the term "discrimination" includes—

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice —

(a) to seek the cooperation of employers' and workers' organizations and other appropriate bodies in promoting the acceptance and observance of this policy;

(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;

(d) to pursue the policy in respect of employment under the direct control of a national authority;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

Article 6

Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organization.

. . . .

Recommendation No. 111

I. DEFINITIONS

1. (1) For the purpose of this Recommendation the term "discrimination" includes —

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

(2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.

(3) For the purpose of this Recommendation the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

II. FORMULATION AND APPLICATION OF POLICY

2. Each Member should formulate a national policy for the prevention of discrimination in employment and occupation. This policy should be applied by means of legislative measures, collective agreements between representative employers' and workers' organizations or in any other manner consistent with national conditions and practice, and should have regard to the following principles:

(a) the promotion of equality of opportunity and treatment in employment and occupation is a matter of public concern;

(b) all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of —

  (i) access to vocational guidance and placement services;

  (ii) access to training and employment of their own choice on the basis of individual suitability for such training or employment;

  (iii) advancement in accordance with their individual character, experience, ability and diligence;

  (iv) security of tenure of employment;

  (v) remuneration for work of equal value;

  (vi) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment;

(c) government agencies should apply non-discriminatory employment policies in all their activities;

(d) employers should not practise or countenance discrimination in engaging or training any person for employment, in advancing or retaining such person in employment, or in fixing terms and conditions of employment; nor should any person or organization obstruct or interfere, either directly or indirectly, with employers in pursuing this principle;

(e) in collective negotiations and industrial relations the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment or in respect of the terms and conditions of employment;

(f) employers' and workers' organizations should not practise or countenance discrimination in respect of admission, retention of membership or participation in their affairs.

3. Each Member should —

(a) ensure application of the principles of non-discrimination —
   (i) in respect of employment under the direct control of a national authority;
   (ii) in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;

(b) promote their observance, where practicable and necessary, in respect of other employment and other vocational guidance, vocational training and placement services by such methods as —
   (i) encouraging state, provincial or local government departments or agencies and industries and undertakings operated under public ownership or control to ensure the application of the principles;
   (ii) making eligibility for contracts involving the expenditure of public funds dependent on observance of the principles;
   (iii) making eligibility for grants to training establishments and for a licence to operate a private employment agency or a private vocational guidance office dependent on observance of the principles.

4. Appropriate agencies, to be assisted where practicable by advisory committees composed of representatives of employers' and workers' organizations, where such exist, and of other interested bodies, should be established for the purpose of promoting application of the policy in all fields of public and private employment, and in particular —

(a) to take all practicable measures to foster public understanding and acceptance of the principles of non-discrimination;

(b) to receive, examine and investigate complaints that the policy is not being observed and, if necessary by conciliation, to secure the correction of any practices regarded as in conflict with the policy; and

(c) to consider further any complaints which cannot be effectively settled by conciliation and to render opinions or issue decisions concerning the manner in which discriminatory practices revealed should be corrected.

5. Each Member should repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy.

6. Application of the policy should not adversely affect special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status are generally recognized to require special protection or assistance.

7. Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State should not be deemed to be discrimination, provided that the individual concerned has the right to appeal to a competent body established in accordance with national practice.

8. With respect to immigrant workers of foreign nationality and the members of their families, regard should be had to the provisions of the Migration for Employment Convention (Revised), 1949, relating to equality of treatment and the provisions of the Migration for Employment Recommendation (Revised), 1949, relating to the lifting of restrictions on access to employment.

9. There should be continuing cooperation between the competent authorities, representatives of employers and workers and appropriate bodies to consider what further positive measures may be necessary in the light of national conditions to put the principles of non-discrimination into effect.

III. COORDINATION OF MEASURES FOR THE PREVENTION OF DISCRIMINATION IN ALL FIELDS

10. The authorities responsible for action against discrimination in employment and occupation should cooperate closely and continuously with the authorities responsible for action against discrimination in other fields in order that measures taken in all fields may be coordinated.

Price: 20 Swiss francs

ISBN 92-2-109866-4